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In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

CPC INTERNATIONAL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 92-2288, 92-2326

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

CORDOVA CHEMICAL COMPANY OF MICHIGAN;
CORDOVA CHEMICAL COMPANY; AEROJET-GENERAL
CORPORATION (92-2288), DEFENDANTS-APPELLANTS

CPC INTERNATIONAL INC. (92-2326),
DEFENDANT-APPELLANT

MICHIGAN DEPARTMENT OF NATURAL RESOURCES,
DEFENDANT-APPELLEE

[Decided: May 13, 1997]

OPINION

Before: MARTIN, Chief Judge; MERRITT, KENNEDY, MILBURN, NELSON, RYAN, BOGGS, NORRIS, SILER, BATCHELDER, DAUGHTREY, and MOORE, Circuit Judges.

NORRIS, J., delivered the opinion of the court, in which KENNEDY, MILBURN, NELSON, BOGGS, SILER, and BATCHELDER, JJ., joined and in which MERRITT, J., joined as to Part III.C.3. MERRITT, J. (pp. [24a-32a]), delivered a separate opinion concurring in part and dissenting in part. RYAN, J. (pp. [32a-54a]), delivered a separate dissenting opinion in which MARTIN, C.J., DAUGHTREY, and MOORE, JJ., joined and in which MERRITT, J., joined as to Part I.

ALAN E. NORRIS, Circuit Judge.

This appeal highlights the difficulty that often attends the apportionment of liability for the clean-up costs of sites that have been subjected to long-term environmental degradation. In the present case, brought pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993), the environmental damage occurred over a period of decades and during the watch of several owners.

A central concern on appeal is the criteria required under CERCLA before a parent corporation can be held financially liable for pollution that occurred on a site owned by a subsidiary. Because we adopt a stricter standard than did the district court for imposition of such liability, we reverse certain of its determinations and remand for further proceedings.

I. PROCEEDINGS BELOW

In May and June 1991, the district court conducted a fifteen-day bench trial to determine which parties were responsible for clean-up costs related to pollution of a site located in Dalton Township, Michigan. In addition to the live testimony of twenty-nine witnesses, the court received more than 2,300 exhibits and reviewed dozens of deposition transcripts. Given the complexity of the proceedings below, the factual findings contained in the district court's published opinion are extensive. *CPC Int'l, Inc. v. Aerojet-General Corp.*, 777 F.Supp. 549, 555-70 (W.D.

Mich. 1991). We summarize them here by way of background.

Beginning in 1957, a series of owners used the Dalton Township site to manufacture chemicals. The initial owner, the Ott Chemical Company ("Ott I"), controlled the site from 1957 until 1965. During this time, the groundwater flowing underneath the site became contaminated, a development confirmed by tests conducted in 1964.

Pollution of soil, surface water, and groundwater continued after the Ott Chemical Company ("Ott II"), a wholly owned subsidiary of CPC International, Inc. ("CPC"), took over ownership of the site in 1965. The use of unlined lagoons as a means of chemical waste disposal was the principal cause of the contamination. According to the district court, this practice spanned the period from 1959 until at least 1968.

See page from these lagoons did not, however, constitute the sole source of pollution that occurred during the ownership of Ott I and Ott II. Further contamination emanated from chemical spills from train cars, from chemical drums, from overflows of chemicals contained in a cement-lined equalization basin, and from other sources. Groundwater pollution did not go completely untreated during this time; from 1965 until 1974, purge wells were operated intermittently in an attempt to alleviate the problem.

In 1972, the Story Chemical Company ("Story") acquired the site from Ott II and continued to operate it until 1977, when bankruptcy ended operations. At that point, the trustee in bankruptcy assumed title to the site and attempted to find a buyer.

Active governmental response to the pollution problems at the site began in 1977, after Story's bankruptcy, when the Michigan Department of Natural Resources ("MDNR") visited the site to assess the situation. In view of the severity of the environmental problems and the lack of resources to pay for a cleanup, the MDNR became active in an effort to attract a purchaser who would participate financially in clean-up efforts. This search led to the signing of a document on October 13, 1977, by the Cordova Chemical Company ("Cordova/California"), a wholly owned subsidiary of Aerojet-General Corporation ("Aerojet"), and the MDNR. The district court described the agreement and its aftermath:

> It addressed the problem of environmental contamination at the property and set forth obligations with respect to cleanup activities. . . .
>
> . . . .
>
> . . . MDNR agreed to remedy the waste container and sludge problems, and Cordova/California agreed to eliminate the phosgene gas and give MDNR $600,000 to defray the costs of the agency's cleanup of the waste containers, sludge and residential wells.
>
> . . . .
>
> With respect to Cordova/California's $600,000 payment and the company's responsibility or liability for the contamination at the site it was acquiring, the [agreement] stated:
>
> . . . .

> Cordova Chemical Company shall not have any responsibility or liability in connection with any other corrective actions which the Department of Natural Resources or any other governmental agency may hereafter deem necessary. . . .
>
> . . . .
>
> However, the agreement did not provide for a total cleanup of the site's severe environmental problems. . . .
>
> In particular, MDNR and Cordova/California did not reach an agreement regarding a remedy for the groundwater contamination problem. Instead, the fate of the groundwater problems was not resolved, with MDNR left to tackle the problem as part of its overall regulatory responsibility for the site.
>
> . . . Cordova/California and MDNR fulfilled their cleanup obligations under the [agreement].

CPC Int'l v. Aerojet-General, 777 F.Supp. at 564-67.

Having executed this document, Cordova/California purchased the site the following day from the Story bankruptcy trustee. Cordova Chemical Company of Michigan ("Cordova/Michigan"), a wholly owned subsidiary of Cordova/California, acquired ownership of the site in 1978. Cordova/Michigan retains ownership, although manufacturing operations at the site ceased in 1986.

The district court made the following observations regarding conditions at the site during the ownership of the Cordova companies:

> During their period of operations, [the companies] neither buried waste nor dumped it onto the ground. No chemical waste was disposed into the unlined lagoons that had been used during the Ott I and Ott II eras. Before beginning chemical manufacturing, Cordova/Michigan repaired the equalization basin and chemical sewer system. When operating, Cordova/Michigan discharged chemical waste through off-site disposal or to a sewer that flowed to the Muskegon County treatment facility.

Id. at 556. In short, although the preexisting groundwater contamination problem was not remedied during their ownership, the trial court concluded that neither Cordova/California nor Cordova/Michigan exacerbated the condition.[1]

The federal Environmental Protection Agency became involved in cleanup of the site in 1981. Since then, the EPA has formulated a long-term response to the environmental damage that has occurred at the site; the cost of this effort will run into the millions of dollars.

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[1] The district court noted that two hazardous chemicals—benzene and 1,2 dichloroethane—were found at the site and used during the Cordova period of ownership. *Id.* at 556, 579 n. 11. Although Cordova/Michigan, in an April 5, 1984 letter to the federal EPA, acknowledges generating small quantities of these materials for disposal, we find nothing in the record to support a finding that any additional release of hazardous substances occurred at the site during the Cordova period.

II. CERCLA LIABILITY

Section 107(a) of CERCLA lists the parties who are potentially liable for the clean-up costs of a polluted site.[2] 42 U.S.C. § 9607(a). For the purposes of this action, those parties include the present owner *and* operator of a facility from which there is a release of a hazardous substance, any prior owner *or* operator of a facility whose involvement coincided with disposal of a hazardous substance, and any person who arranged for the disposal or transport of hazardous waste from a facility. 42 U.S.C. § 9607(a)(1)-(3). The parties stipulated that the site is a "facility" as defined by CERCLA, that it contains "hazardous sub-

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[2] 42 U.S.C. § 9607(a) states, in part:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
>
> (1) the owner and operator of a . . . facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, . . . from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—
>
> (A) all costs of removal or remedial action. . . .

stances," that "releases" of hazardous substances have occurred and threaten to continue, and that CPC, the MDNR, Aerojet, Cordova/California, and Cordova/Michigan are "persons" as defined by the statute. *Id.* at 556.

Because courts that have been asked to render liability decisions in CERCLA actions frequently invoke the remedial purpose of the act, *e.g.*, *United States v. Kayser-Roth Corp., Inc.*, 910 F.2d 24, 26 (1st Cir. 1990), *cert. denied*, 498 U.S. 1084, 111 S. Ct. 957, 112 L.Ed.2d 1045 (1991), we will review that subject before considering the liability of those parties now before us.

Congress enacted CERCLA as a "remedial statute designed to protect and preserve public health and the environment." *Kayser-Roth*, 910 F.2d at 26; *accord Schiavone v. Pearce*, 79 F.3d 248, 253-54 (2d Cir. 1996); *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221 (3d Cir. 1993); *Anspec Co., Inc. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1241-42 (6th Cir. 1991) (reviewing this circuit's approach to CERCLA liability). Accordingly, courts generally will not interpret § 9607(a) in a way that apparently frustrates the statute's goals in the absence of specific congressional intent to the contrary. *Anspec*, 922 F.2d at 1247 (citing *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1045 (2d Cir. 1985)).

It must be recognized, however, that it is difficult to divine the specific, as opposed to the general, goals of Congress with respect to CERCLA liability since the statute represents an eleventh hour compromise. *See generally Shore Realty Corp.*, 759 F.2d at 1039-42 (discussing legislative history). As the district court

recognized, "some of CERCLA's provisions are vague and its legislative history sparse." *CPC Int'l v. Aerojet-General*, 777 F.Supp. at 571; *accord Anspec*, 922 F.2d at 1247 (characterizing the legislative history as "scant"); *Lansford-Coaldale Joint Water Auth.*, 4 F.3d at 1221 ("[C]ongressional intent may be particularly difficult to discern with precision in CERCLA, a statute notorious for its lack of clarity and poor draftsmanship.").

Courts would not be warranted, therefore, in pointing to the "remedial legislation" litany, *see generally* Norman J. Singer, 3 Southerland Statutory Construction § 60.01 (5th ed.1992) (the rule that remedial statutes should be liberally construed is "firmly established"); *Dennis v. Higgins*, 498 U.S. 439, 443, 111 S.Ct. 865, 868, 112 L.Ed.2d 969 (1991) (noting that 42 U.S.C. § 1983, as a remedial statute, should be liberally construed), as a reason for filling in the blanks left by this sketchy legislative history to impose liability under nearly every conceivable scenario. Thus, while the liability provisions concerning facility operators should be construed so that financial responsibility for clean-up operations falls upon those entities that contributed to the environmental problem, the widest net possible ought not be cast in order to snare those who are either innocently or tangentially tied to the facility at issue. In fact, this court has pointed out that, "Congress intended that those responsible for disposal of chemical poisons bear the cost and responsibility for remedying the harmful conditions *they created*." *Anspec*, 922 F.2d at 1247 (emphasis added).

In turning to the specific facts now before us, we adhere to the tenet that liability attaches only to

those parties who are culpable in the sense that they, by some realistic measure, helped to create the harmful conditions.

In its effort to discern the sweep of CERCLA liability, the district court concluded that:

> CERCLA broadens the potential for liability of parent corporations without discarding entirely the traditional concept of limited liability that is central to corporate law. . . .
>
> Accordingly, it seems that CERCLA's "owned or operated" language forges a *new, middle ground.* It is a ground that at once accommodates the general principle of limited liability and the broader principle of liability attaching for operative activity. To permit these principles to coexist under CERCLA, the liability of a parent corporation cannot attach simply because a parent has had involvement with its subsidiary in a manner merely consistent with their investment relationship. Rather, a parent must have actually operated the business of its subsidiary.

In this court's view, then, a parent corporation is directly liable under section 107(a)(2) as an operator only when it has exerted power or influence over its subsidiary by actively participating in and exercising control over the subsidiary's business during a period of disposal of hazardous waste. A parent's actual participation in and control over a subsidiary's functions and decision-making creates "operator" liability under CERCLA; a parent's mere oversight of a subsidiary's business in a manner appropriate and consistent with the investment relationship

> between a parent and its wholly owned subsidiary does not.

CPC Int'l v. Aerojet-General, 777 F.Supp. at 573 (emphasis added).

On the basis of this "new, middle ground," the district court found both CPC and Aerojet liable as operators for the disposal of hazardous substances that occurred while their subsidiaries operated the site.

III. DISCUSSION

A. CPC

The district court reasoned that liability potentially could attach to CPC as a parent corporation in two ways: direct liability under CERCLA's "operator" language or by common law veil-piercing. Clearly, since the facility was titled in the subsidiary's name, CPC could be found liable as an owner *only* through veil piercing. The court determined that CPC was liable as an operator of the site for environmental damage that occurred during the ownership of Ott II; this liability was grounded in section 107(a)(2) of CERCLA, which renders "any person [liable] who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607(a)(2). To reach this conclusion, the court necessarily had to hold CPC, as a parent corporation, accountable for the environmental conduct of its wholly owned subsidiary corporation, Ott II. And, because the court held CPC directly liable as an operator, it did not reach the question of whether

CPC was liable as an owner pursuant to the traditional common law doctrine of veil-piercing.

It is not at all clear from the district court's opinion whether the basis for finding parental liability as an operator under its "new, middle ground" is the actual operation of the subsidiary's business or, on the other hand, the exertion of power or influence through active participation in the subsidiary's business. Although they are used interchangeably in the district court's opinion, the two concepts are not interchangeable. If anything, the facts recited by the district court support liability under the latter standard but not under the former. This confusion underscores the inevitable difficulty that arises when courts attempt to erect new concepts of corporate liability within the framework of CERCLA in the absence of direction from Congress. We are not persuaded that, in enacting CERCLA, Congress contemplated the abandonment of traditional concepts of limited liability associated with the corporate form in favor of an undefined "new, middle ground."

Actually, another scenario occurs to us under which one could argue that a parent corporation should be deemed to have directly operated a facility owned by its subsidiary. At least conceivably, a parent might independently operate the facility in the stead of its subsidiary; or, as a sort of joint venturer, actually operate the facility alongside its subsidiary. However, this is not a theory of operator liability relied upon by the district court, or alluded to in its opinion.

CERCLA defines the "owner or operator" of an onshore facility as "any person owning or operating such facility." 42 U.S.C. § 9601(20)(A)(ii). When the facility has been conveyed to a unit of state or local government, the definition differs. It then includes "any person who owned, operated or otherwise controlled activities at such facility immediately [before the transfer to the governmental authority]." 42 U.S.C. § 9601(20)(A)(iii). It thus appears that the drafters of the statute distinguished an operator from a person who "otherwise controlled" a facility. When the owner of a facility contracts out the daily running of the operation to a third party, that party presumably attains operator status (and its attendant liability). However, when a parent corporation actively participates in the affairs of its subsidiary consistent with the restrictions imposed by traditional corporations law, nothing in the definition just cited or in the rest of the statute indicates that the parent has assumed the role of operator.

Despite the definition of "owner or operator," several circuits, like the district court below, have determined that parent corporations can attain operator status by exerting significant control over the operations of their subsidiaries. *See, e.g., Kayser-Roth*, 910 F.2d at 26-27; *Schiavone*, 79 F.3d at 255; *Lansford-Coaldale Joint Water Auth.*, 4 F.3d at 1221; *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 842 (4th Cir.), *cert. denied*, 506 U.S. 940, 113 S.Ct. 377, 121 L.Ed.2d 288 (1992); *CPC Int'l v. Aerojet-General*, 777 F.Supp. at 572-73.

While some may wish to extend the reach of CERCLA to maximize the impact of its remedies, nothing in the statute or its legislative history

warrants the invocation by courts of vague, expansive concepts, such as the district court's "new, middle ground," which threaten the efficacy of time-honored limited liability protections afforded by the corporate form. As the Court of Appeals for the Fifth Circuit has noted in this context, "[i]f Congress wanted to extend liability to parent corporations it could have done so, and it remains free to do so." *Joslyn Mfg. Co. v. T.L. James & Co., Inc.*, 893 F.2d 80, 83 (5th Cir. 1990).

The district court's approach presents a number of problems. First, it replaces the relatively bright line provided by the traditional doctrine of piercing the corporate veil with a nebulous "control" test. When, precisely, is a parent acting in a manner consistent with its investment relationship as opposed to a manner that triggers operator liability? The indicia enumerated by the district court, such as participation in the subsidiary's board of directors and involvement in specific policy decisions, offer little guidance. Certainly, these activities are not grounds traditionally relied upon as warranting the disregard of separate corporate existences.

Second, the threat of unlimited liability will likely deter private sector participation in the cleanup of existing sites. The case before us illustrates this point. There is no dispute that the MDNR actively sought a private sector partner to take over and assist in the remediation of the site. Aerojet indicated an interest on the condition that it could cap its potential liability for environmental cleanup, which it sought to accomplish through the negotiation of the agreement with the MDNR and the use of subsidiaries.[3] To scuttle such sensible and legitimate precautions in favor of an unpredictable "control" test would actually contravene the public interest by discouraging businesses from being involved in such projects.

Accordingly, we reject the district court's "new, middle ground" as the basis for fixing operator liability and hold that where a parent corporation is sought to be held liable as an operator pursuant to 42 U.S.C. § 9607(a)(2) based upon the extent of its control of its subsidiary which owns the facility, the parent will be liable only when the requirements necessary to pierce the corporate veil are met. In other words, under the circumstances of this case, whether the parent will be liable as an operator depends upon whether the degree to which it controls its subsidiary and the extent and manner of its involvement with the facility, amount to the abuse of the corporate form that will warrant piercing the corporate veil and disregarding the separate corporate entities of the parent and subsidiary.

Whether the circumstances in this case warrant a piercing of the corporate veil will be determined by state law. *See Anspec*, 922 F.2d at 1248. Michigan appears to follow the general rule that requires demonstration of patent abuse of the corporate form in order to pierce the corporate veil. There must be such a unity of interest and ownership that the separate personalities of the corporation and its owner cease to exist, and the circumstances must

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[3] Although it does not affect our resolution of the liability issue, we note that these negotiations occurred before the enactment of CERCLA.

be such that adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice. 1 William M. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 41.30 (perm. ed. rev. vol. 1990); Stephen H. Schulman et al., Michigan Corporation Law & Practice § 3.9(c) (1991 Supp.); *Seasword v. Hilti, Inc.*, 449 Mich. 542, 548, 537 N.W.2d 221, 224 (1995) (corporate veil may be pierced where the subsidiary is a "mere instrumentality" of the parent and the separate corporate existence is used to subvert justice or cause result contrary to clearly overriding public policy); *see also Bodenhamer Bldg. Corp. v. Architectural Research Corp.*, 873 F.2d 109, 111-12 (6th Cir. 1989) (surveying Michigan corporate veil-piercing decisions). Organization of a corporation for the avowed purpose of avoiding personal responsibility does not in itself constitute fraud or reprehensible conduct justifying a disregard of the corporate form. *Gledhill v. Fisher & Co.*, 272 Mich. 353, 359, 262 N.W. 371, 373 (Mich. 1935).[4]

The district court relied upon a number of factors in determining that CPC "actively participated in and exerted significant control over Ott II's business and decision-making" and was therefore directly liable under 42 U.S.C. § 9607(a)(2) as an operator:

[4] We do not conclude, as suggested by the dissent, "[t]hat piercing the corporate veil under Michigan law requires showing that the corporate form was used to 'subvert justice.'" Rather, it requires that the subsidiary be a "mere instrumentality" of the parent which is used *either* to subvert justice *or* to circumvent overriding public policy. In our view, none of these factors fairly characterize the relationship between CPC and Ott II.

100% ownership of Ott II; participation on Ott II's board of directors; a cross-pollination of officers who were involved in decision-making and daily operations; active participation by CPC officials in environmental matters; and financial control of Ott II through approval of budgets and capital expenditures. *CPC Int'l v. Aerojet-General*, 777 F.Supp. at 575. While these factors reveal a parent that took an active interest in the affairs of its subsidiary, they do not indicate such a degree of control that the separate personalities of the two corporations ceased to exist and that CPC utilized the corporate form to perpetrate the kind of fraud or other culpable conduct required before a court can pierce the veil. While CERCLA contemplates allocating financial responsibility to those corporations that cause environmental degradation, it does not authorize assignment of liability to parent corporations that abide by the proper use of the corporate form.

In summary, then, it seems to us that under the "owned or operated" language of 42 U.S.C. § 9607(a)(2), there are three scenarios under which a parent corporation could be held liable for the disposal of hazardous substances at a facility whose owner of record was the parent's subsidiary corporation. First, as an owner, by piercing the corporate veil. Second, as an operator, where the parent directly operates the facility itself, either independently of its subsidiary, or as an actual co-operator alongside the subsidiary.[5] Although a parent conceivably could be

[5] Thus, the dissent's characterization of our opinion as holding "that a parent cannot, as a matter of law, be held directly liable under 42 U.S.C. § 9607(a)(2) as an 'operator' of a facility owned by its subsidiary corporation" is mistaken.

held liable under this theory, it is not the one relied upon by the district court, and, in any event, is not supported by the facts in the record before us.

Finally, operator liability may be based upon the conduct of the parent in the course of its affiliation with its subsidiary, including the degree of control exerted by the parent over its subsidiary. This is the scenario utilized by the district court, relying upon its "new, middle ground" standard to define the circumstances under which the parent will be liable. As pointed out above, we conclude that this "new, middle ground" is unworkable, and that traditional veil piercing is the only standard under which this scenario for liability can be assessed reliably.

Accordingly, the district court's finding of operator liability with respect to CPC must be reversed.

B. MDNR Liability

The district court rejected liability claims that were advanced against the MDNR on two fronts: as an operator and as an "arranger." Only the district court's decision regarding arranger liability is appealed.

CERCLA imposes liability on

> any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment of hazardous substances owned or possessed by such person, by any other party or entity, at any facility ... owned or operated by another party or entity and containing such hazardous substances.

42 U.S.C. § 9607(a)(3).

It is contended that the MDNR incurred arranger liability when it negotiated with Cordova/California for the acquisition of the site and agreed with Cordova/California on a plan to clean up the groundwater contamination.

We agree with the district court's conclusion that the MDNR escapes liability because its actions were taken in response to the Act's environmental emergency provision:

> No state or local government shall be liable under this subchapter for costs or damages as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person. This paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or local government. For the purpose of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence.

42 U.S.C. § 9607(d)(2). Our reading of the record indicates that the MDNR acted in good faith when attempting to address the groundwater contamination of the site. That its efforts proved to be less than entirely successful is unfortunate, but does not subject the agency to liability.[6]

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[6] We note that, since this case was briefed and argued, the Supreme Court decided *Seminole Tribe of Fla. v. Florida*, — U.S. ——, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), which potentially provides the MDNR with an Eleventh Amendment defense. Because this issue has not been raised by the parties

C. Liability of Aerojet and its Subsidiaries

1. *Owner Liability*

The district court held both Aerojet and Cordova/Michigan liable as present owners of the site under CERCLA'S section 107(a)(1) which assigns liability to "the owner and operator of a . . . facility." 42 U.S.C. § 9607(a)(1). Cordova/Michigan does not challenge this decision on appeal and we therefore express no opinion with respect to its liability.

As for the parent corporation, Aerojet could be found liable as an owner only through veil piercing, since Cordova/Michigan was the owner of record. The district court appropriately looked to Michigan law to determine whether to pierce the corporate veil and, in its view, the evidence supported a conclusion that Aerojet had "totally dominated Cordova/Michigan, creating a complete identity of interests between the parent and its wholly owned subsidiary." *CPC Int'l v. Aerojet-General*, 777 F.Supp. at 578. Accordingly, the court determined that it was appropriate to pierce the corporate veil. Among the grounds cited for its decision, the court highlighted the total ownership by the parent, Aerojet's active participation in the acquisition of the site, the timing of the incorporation of the subsidiaries, cross- pollination of corporate officers, financial control, and the integration of the businesses. *Id.* at 577.

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through supplemental briefs and the resolution of the case with respect to the MDNR is not affected, we choose not to consider the impact of *Seminole Tribe* at this point in the proceedings.

These facts, however, fall somewhat short of what is required to pierce the corporate veil under Michigan law. They do not establish that Cordova/Michigan was a mere instrumentality of Aerojet in the sense that the separate corporate personalities of the parent and subsidiary ceased to exist. More tellingly, they do not reveal activity by Aerojet that approaches the level of culpable conduct contemplated by Michigan law as a predicate to disregarding the separate corporate form. *Bodenhamer Bldg. Corp.*, 873 F.2d at 112. While Aerojet obviously sought to limit its liability for existing environmental problems through good faith negotiation with the MDNR and prudent use of the corporate form, there is nothing to suggest that the company acted to subvert justice or with fraudulent intent or otherwise sought to distort the legitimate purposes of the corporate form. Although Aerojet took an active interest in its subsidiaries, the record does not support a conclusion that Cordova/Michigan was not a viable corporate entity. Accordingly, the district court erred when it pierced the corporate veil to assign liability to Aerojet as an owner.

The district court also noted that Cordova/California actually owned the site from October 1977 until November 1978. Although the company began clean-up operations as required by its agreement with the MDNR, the district court found that additional releases of hazardous substances occurred during this period. *CPC Int'l v. Aerojet-General*, 777 F. Supp. at 579. It thus imposed liability on Cordova/California as a former owner pursuant to section 107(a)(2).

This conclusion, however, conflicts with the district court's summary of activity at the site during the ownership of the Cordova companies. *Id.* at 556. On remand, therefore, we ask the district court to indicate with greater specificity precisely which portions of the record it relies upon to support a finding that additional releases of hazardous substances occurred during Cordova/California's brief ownership. Absent such evidence, liability cannot attach to Cordova/California as a former owner of the site.

2. *Operator Liability*

Finally, we turn to the district court's alternative imposition of liability on Aerojet pursuant to section 107(a)(2), precisely the same basis for liability that we have already discussed, and rejected, with respect to CPC. Since we decline to adopt the "new, middle ground" control test utilized by the district court, no liability attaches unless the corporate veil can be pierced. And because the record does not support veil piercing, Aerojet cannot be held liable as an operator pursuant to section 107(a)(2).

3. *Defenses*

Upon remand, the district court should also revisit its treatment of the defense raised by Aerojet, Cordova/California, and Cordova/Michigan under section 107(b)(3). The pertinent part of the statute follows:

> [A] person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were *caused* solely by—

> . . . .
>
> (3) an act or omission of a third party other than . . . one whose act or omission occurs *in connection with* a contractual relationship, existing directly or indirectly, with the defendant . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, . . . and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions. . . .

42 U.S.C. § 9607(b) (emphasis added).

In parsing the exceptions to the defense, the district court noted that under 42 U.S.C. § 9601(35)(A), the term "contractual relationship" includes deeds transferring title. Thus, the district court concluded that a defense would be unavailable to a defendant who had a direct or indirect contractual relationship with the parties responsible for contaminating the site. *CPC Int'l v. Aerojet-General*, 777 F.Supp. at 581. Under this view, the defense could not be invoked by any defendant who was a party to a deed with a polluter. The district court, however, ignored the requirement that, in order to render the defense inapplicable, the hazardous substance release must have resulted from the act of a third party "in connection with" the contractual relationship with the defendant. The "in connection with" language of the defense appears to have been designed to preclude

a person from escaping liability by contracting for a third party to do his dirty work for him.

As we pointed out above, from what we glean from the district court's recitation of facts, the release of hazardous substances appears to have been *caused* solely by the predecessors of these three defendants.

IV. CONCLUSION

For the foregoing reasons, the district court is **reversed** in part and **affirmed** in part and this cause is **remanded** to the district court for further proceedings consistent with this opinion.

MERRITT, Circuit Judge, concurring in part and dissenting in part.

I concur in part I of Judge Ryan's opinion, which would hold CPC International directly liable as an operator. I also concur in part III.C.3. of Judge Norris' opinion for the Court and support remanding the case for further findings regarding the Aerojet defendants' assertion of the "third-party" defense, CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3), and for further findings regarding whether or not disposal of hazardous substances occurred while the Aerojet defendants owned the site. Unlike Judges Ryan and Norris, however, I believe that federal common law governs the question of whether Cordova/California and Aerojet are liable as current owners pursuant to CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1), rather than Michigan's doctrine of piercing the corporate veil. Since the district court improperly analyzed this question using Michigan state law, I would remand the case for further findings.

I. State Law v. Federal Common Law

Several of the parties argue that Cordova/Michigan, the nominal owner of the site, is an alter ego of Cordova/California and Aerojet and that Cordova/California and Aerojet should thus be held liable as owners under the doctrine of piercing the corporate veil. Resolution of this issue first requires deciding whether the question is governed by state law or federal common law.

It is well-established that actions arising under nationwide federal programs are governed by federal law. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726, 99 S.Ct. 1448, 1457, 59 L.Ed.2d 711 (1979). But federal law can incorporate applicable state law doctrines in appropriate circumstances. *Id.* at 727-28, 99 S. Ct. at 1457-59. In *Kimbell Foods*, the Supreme Court enumerated the factors a court must consider in deciding whether to apply state law or federal common law. "[F]ederal programs that 'by their nature are and must be uniform in character throughout the Nation' necessitate formulation of controlling federal rules," *id.* at 728, 99 S.Ct. at 1458 (quoting *United States v. Yazell*, 382 U.S. 341, 354, 86 S. Ct. 500, 507, 15 L.Ed.2d 404 (1966)), but courts must also consider "whether application of state law would frustrate specific objectives of the federal programs" and "the extent to which application of a federal rule would disrupt commercial relationships predicated on state law." *Id.*

Under the *Kimbell Foods* test, federal common law standards for piercing the corporate veil should be applied in CERCLA actions against parent cor-

porations. All three of the *Kimbell Foods* factors support using a uniform federal standard.

> In attempting to eliminate the dangers of hazardous wastes, CERCLA presents a national solution to a nationwide problem. One can hardly imagine a federal program more demanding of national uniformity than environmental protection. Congress did not intend that the ability of the executive to fund the clean up of hazardous waste sites should depend on the attitudes of the several states toward parent-subsidiary liability in general, or CERCLA in particular. The need for a uniform federal rule is especially great for questions of piercing the corporate veil, since liability under the statute must not depend on the particular state in which a defendant happens to reside.

In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution, 675 F.Supp. 22, 31 (D. Mass. 1987).

Congress intended for CERCLA to cast a wide net of responsibility for the costs of environmental cleanup. Uniform national standards of liability are necessary to effectuate this goal. Following state law in this area would allow corporations to easily evade their environmental responsibilities under CERCLA by incorporating subsidiaries in states with stringent standards for piercing the corporate veil. *See* 126 Cong. Rec. H11787 (daily ed. Dec. 3, 1980) (statement of Rep. Florio, CERCLA House sponsor) ("[t]o insure the development of a uniform rule of law, and to discourage business dealings in hazardous substances from locating primarily in States with more lenient laws, the bill will encourage the further development of a Federal common law in this area"). In addition,

states' interests in regulating corporations are strongest with respect to internal affairs of the corporation, and are less compelling with respect to external affairs such as shareholder liability to outside parties. *See* Henry Hansmann & Reinier Kraakman, *A Procedural Focus on Unlimited Shareholder Liability*, 106 Harv. L.Rev. 446, 450-53 (1992) (arguing that choice of law concerns do not bar unlimited shareholder liability in tort actions); Note, *Piercing the Corporate Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 Harv. L.Rev. 853, 862-63 (1982) (arguing that piercing the corporate veil relates to external affairs and should be governed by the law of the forum); *cf. First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 621, 103 S.Ct. 2591, 2597, 77 L.Ed.2d 46 (1983) ("As a general matter, the law of the [country] of incorporation normally determines issues relating to the internal affairs of a corporation. . . . Different conflicts principles apply, however, where the rights of third parties external to the corporation are at issue." (citations omitted)).

Federal precedents support using a federal common law standard for piercing the corporate veil to determine parent corporation CERCLA liability. Although few circuit courts have considered the issue, *compare Lansford-Coaldale Joint Water Authority v. Tonolli Corp.*, 4 F.3d 1209, 1225 (3d Cir. 1993) (applying federal common law) with *Joslyn Manufacturing Co. v. T.L. James & Co.*, 893 F.2d 80 (5th Cir. 1990) (affirming a district court opinion that declined to address the choice of law question on the grounds that the standard for piercing the corporate veil are the same under state and federal law), district

courts have overwhelmingly applied federal common law in this context. *Idylwoods Assocs. v. Mader Capital, Inc.*, 915 F.Supp. 1290, 1305 (W.D.N.Y. 1996); *Atlantic Richfield Company v. Blosenski*, 847 F.Supp. 1261, 1278 (E. D. Pa. 1994); *City of New York v. Exxon Corp.*, 112 B.R. 540, 552 (S.D.N.Y. 1990), *aff'd on other grounds*, 932 F.2d 1020 (2d Cir. 1991); *United States v. Kayser-Roth Corp.*, 724 F.Supp. 15, 20 (D.R.I.1989), *aff'd on other grounds*, 910 F.2d 24 (1st Cir. 1990); *United States v. Nicolet, Inc.*, 712 F.Supp. 1193, 1201 (E.D. Pa.1989); *In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*, 675 F.Supp. 22, 30-31 (D. Mass. 1987); *cf. Jacksonville Elec. Auth. v. Eppinger and Russell Co.*, 776 F.Supp. 1542, 1545-46 (M.D. Fla. 1991) (applying Fifth Circuit standard without discussing the choice of law question), *aff'd on other grounds sub nom Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107 (11th Cir. 1993); *United States v. Mottolo*, 695 F.Supp. 615, 624 (D.N.H. 1988) (holding parent corporation liable without piercing the corporate veil because "CERCLA places no importance on the corporate form").

Additional support for using a federal common law standard comes from cases involving successor corporation liability under CERCLA. Although this Court has previously relied on state law in that context, *see Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240 (6th Cir. 1991), other circuits that have considered this issue have applied federal common law. *See B.F. Goodrich v. Betkoski*, 99 F.3d 505, 519 (2d Cir. 1996); *United States v. Carolina Transformer Co.*, 978 F.2d 832 (4th Cir. 1992); *Louisiana-Pacific Corp. v. Asarco, Inc.*, 909 F.2d 1260 (9th Cir. 1990);

Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86 (3d Cir. 1988); *see also United States v. Mexico Feed and Seed Co.*, 980 F.2d 478, 487 n. 9 (8th Cir. 1992) (stating in dicta that federal common law should probably be applied).[1]

II. The Proper Federal Standard

Piercing the corporate veil is an equitable doctrine. "The federal common law in this area emerges from the general principle that 'a corporate entity may be disregarded in the interests of public convenience, fairness and equity.'" *In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*, 675 F.Supp. 22, 33 (D. Mass. 1987) (quoting *Town of Brookline v. Gorsuch*, 667 F.2d 215, 221 (1st Cir.1981)); *see also American Bell Inc. v. Federation of Tel. Workers*, 736 F.2d 879, 886 (3d Cir. 1984) ("the appropriate occasion for disregarding the corporate existence occurs when the court must prevent fraud, illegality or injustice, or when recognition of the corporate entity would defeat public policy or shield someone from liability for a crime"). Two elements are generally regarded to be essential to pierce the corporate veil: "First, the dominant corporation must have controlled the subservient corporation, and second, the dominant corporation must have proxi-

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[1] The Eleventh Circuit recently applied state law to determine the CERCLA liability of limited partners, *see Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489 (11th Cir. 1996). That is not necessarily inconsistent with applying federal law in claims involving subsidiary corporations, however, since the danger of corporations creating subsidiary partnerships, as compared to subsidiary corporations, in order to evade CERCLA liability is fairly attenuated.

mately caused plaintiff harm through misuse of this control." *Krivo Indus. Supply Co. v. National Distillers & Chem. Corp.*, 483 F.2d 1098, 1103 (5th Cir. 1973).

Although some cases require a showing of fraud, *see, e.g., Edwards Co. v. Monogram Indus.*, 730 F.2d 977, 980-81 (5th Cir.1984), even jurisdictions that require such a showing in some circumstances often recognize that fraud is not always required. *See, e.g., United States v. Jon-T Chems., Inc.*, 768 F.2d 686, 692-93 (5th Cir. 1985) (finding that fraud is not required to pierce the veil in tort cases even though fraud is required in contract cases). Courts applying federal common law have found that fraud is not required to pierce the corporate veil. *See, e.g., Valley Fin., Inc. v. United States*, 629 F.2d 162, 172 (D.C. Cir. 1980). Requiring a showing of fraud would be particularly inappropriate in CERCLA cases. The fraud requirement appears to arise from the equitable nature of the piercing doctrine. The public policy considerations underlying CERCLA, however, provide a sufficient equitable basis for piercing the corporate veil whether or not fraud has been shown. This conclusion is further supported by CERCLA's limited deference to corporate form. *See United States v. Mottolo*, 695 F.Supp. 615, 624 (D.N.H. 1988); *United States v. Kayser-Roth Corp.*, 724 F.Supp. 15, 23-24 (D.R.I. 1989), *aff'd on other grounds*, 910 F.2d 24 (1st Cir. 1990).

Similarly, the proximate cause element should not be required in CERCLA cases, because Congress has provided statutory liability criteria. If a CERCLA defendant is a potentially responsible party under

CERCLA § 107, 42 U.S.C. § 9607, then no further finding of proximate causation should be required.

The test for piercing the corporate veil under federal common law in CERCLA cases thus should be simply whether the parent corporation "controls or at the relevant time controlled the management and operations of the subsidiary." *United States v. Nicolet, Inc.*, 712 F.Supp. 1193, 1202 (E.D. Pa. 1989). Federal courts applying this standard in CERCLA cases have relied on one of two tests: a twelve-factor test set out in *United States v. Jon-T Chems., Inc.*, 768 F.2d 686, 691-92 (5th Cir. 1985); *see Jacksonville Elec. Auth. v. Eppinger and Russell Co.*, 776 F.Supp. 1542, 1545 (M.D. Fla. 1991), *aff'd on other grounds sub nom Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107 (11th Cir. 1993); *Joslyn Corp. v. T.L. James & Co.*, 696 F.Supp. 222, 227 (W.D. La. 1988), *aff'd*, 893 F.2d 80 (5th Cir. 1990); or a seven-factor test set out in *In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*, 675 F.Supp. 22, 33 (D. Mass. 1987); *see Idylwoods Assocs. v. Mader Capital, Inc.*, 915 F.Supp. 1290, 1305 (W.D.N.Y. 1996); *City of New York v. Exxon Corp.*, 112 B.R. 540, 553 (S.D.N.Y. 1990), *aff'd on other grounds*, 932 F.2d 1020 (2d Cir. 1991); *United States v. Kayser-Roth Corp.*, 724 F.Supp. 15, 20 (D.R.I. 1989), *aff'd on other grounds*, 910 F.2d 24 (1st Cir. 1990). These tests overlap, and neither list of factors is exhaustive. Piercing the corporate veil requires a fact-specific inquiry taking into account all of these factors and any other pertinent circumstances. The trier of fact must consider the totality of the circumstances to determine whether the parent controls or controlled the management and operations of the subsidiary.

Because the district court applied Michigan law rather than the proper federal common law standard for piercing the corporate veil, I would remand the case for further review under the proper standard.

RYAN, Circuit Judge, dissenting.

My colleagues' opinion today reaches three important and dispositive conclusions:

> That a parent corporation cannot, as a matter of law, be held directly liable under 42 U.S.C. § 9607(a)(2) as an "operator" of a facility owned by its subsidiary corporation, but may face only vicarious liability under state-law corporation-veil-piercing principles;
>
> That piercing the corporate veil under Michigan law requires circumstances showing that the corporate form was used to "subvert justice"; and
>
> That the district court erred in finding that the defendants failed to prove their entitlement to the so-called third-party defense under 42 U.S.C. § 9607(b)(3).

In my judgment, the court is mistaken on all three grounds, and I therefore respectfully dissent.

I.

Direct Liability of a CPC Under Section 107(a)(2)

A.

Parent Corporations as "Operators"

CERCLA identifies two distinct categories of individuals or entities that may be held directly liable,

as responsible parties, for the costs of cleanup of an environmentally contaminated facility:

> (1) the owner *and* operator of a vessel or a facility, [or]
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of[.]

42 U.S.C. § 9607(a) (emphasis added). The parties have stipulated that the site is a "facility" as defined by CERCLA, and that the site contains "hazardous substances."

The terms "owner" and "operator," as used in section 107(a)(2), are defined in the statute as "any person owning or operating such facility," 42 U.S.C. § 9601(20)(A)(ii), a definition that is, at best, circular and unhelpful. At least one court has observed that "[t]he circularity strongly implies . . . that the statutory terms have their ordinary meanings rather than unusual or technical meanings." *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155, 156 (7th Cir. 1988). Further, it is noteworthy that the definition of "owner" explicitly excludes one whose ownership interest is merely that of a stockholder and who does not participate in management of the facility, 42 U.S.C. § 9601(20)(A)(iii), suggesting that one who *does* participate in management is accordingly susceptible to liability, *see United States v. Kayser-Roth Corp.*, 910 F.2d 24, 26 n. 6 (1st Cir. 1990). Finally, "person" is defined expansively as "an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission,

political subdivision of a State, or any interstate body." 42 U.S.C. § 9601(21). The breadth of this definition plainly leaves room for a parent corporation. *See Kayser-Roth*, 910 F.2d at 25 n. 5.

The first question presented by this appeal is whether a parent corporation may be considered an "operator" under section 107(a)(2) when its subsidiary is the "owner." The district court determined that a parent corporation may face potential liability as an operator of a contaminating facility because the plain language of section 107(a)(2) indicates that Congress intended to impose liability on *any* entity actually operating a facility, regardless of the nature of the entity's ostensible interest in the facility. It is a conclusion with which I agree; indeed, it is a conclusion that the vast majority of circuits—eight out of nine considering the question—have reached as well. *Certain Underwriters at Lloyd's, London v. St. Joe Minerals Corp.*, 90 F.3d 671, 673-74 (2d Cir. 1996); *Schiavone v. Pearce*, 79 F.3d 248, 253-55 (2d Cir. 1996); *FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833, 842 (3d Cir. 1994) (*en banc*); *Lansford-Coaldale Joint Water Authority v. Tonolli Corp.*, 4 F.3d 1209, 1221-22 (3d Cir. 1993); *Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107, 1110 (11th Cir. 1993); *John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401, 408 (1st Cir. 1993); *see Kaiser Aluminum and Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1341-42 (9th Cir. 1992); *Kayser-Roth Corp.*, 910 F.2d at 27; *see also United States v. TIC Investment Corp.*, 68 F.3d 1082, 1091-92 (8th Cir. 1995), *cert. denied*, — U.S. ——, 117 S.Ct. 50, 136 L.Ed.2d 14 (1996); *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 842 (4th Cir. 1992); *cf. Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 420 (7th Cir. 1994). *But see Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80 (5th Cir. 1990).

My colleagues offer several reasons for parting company with this impressive wealth of authority. First, they argue that courts have relied on the so-called remedial purpose of CERCLA to justify their conclusion that CERCLA should be given an expansive meaning, including a meaning that admits of liability for parent corporations as operators. Certainly, the shibboleth "remedial purpose" is a weak basis for legal analysis and I do not find it necessary to resort to it. But what the majority sees as the logical second step to a rejection of the remedial-purpose litany, namely, its "adhere[nce] to the tenet that liability attaches only to those parties who are culpable in the sense that they, by some realistic measure, helped to create the harmful conditions," is, to put it mildly, a *non sequitur*. (Maj. op. at 578.) Implicit in the majority's chosen "tenet" is rejection of the universally accepted principle that liability under CERCLA is both strict, as well as joint and several. *See, e.g., Kayser-Roth*, 910 F.2d at 26; *FMC Corp.*, 29 F.3d at 835. Whether CERCLA's purpose is "remedial" or not, the sounder proposition, I think, is that liability attaches only to those entities whom Congress has singled out for liability. For the reasons set forth below, the statutory language leaves no room to doubt that Congress has singled out operators for liability, irrespective of their corporate form.

The majority is also critical of the district court's language that liability should be predicated on a "new,

middle ground," and contends that this choice of language makes it unclear "whether the [district court's] basis for finding parental liability as an operator . . . is the actual operation of the subsidiary's business or . . . the exertion of power or influence through active participation in the subsidiary's business." (Maj. op. at 579.) It may be that trial courts' inventive "new, middle ground" expression is more conferring than clarifying, but my colleagues' conclusion that the district court's *holding* "threaten[s] the efficacy of time-honored liability protections afforded by the corporate form," simply does not follow. And my colleagues' ultimate conclusion, that a parent can only be found liable "when the requirements necessary to pierce the corporate veil are met," contradicts the plain language of section 107(a)(2). Moreover, it is a conclusion that begs the question this case presents, which, under subsection (a)(2), is not whether a parent corporation may be held vicariously liable for abuse of its subsidiary's corporate form—clearly it may—but whether Congress has created *direct* liability if the facts show that the parent corporation was the actor actually operating a contaminating facility. Stated differently, the issue is whether Congress has excused a parent corporation that is *in fact* operating a contaminating facility from direct liability, simply because it is doing so in the name of a corporate subsidiary. The majority's belief that such an excuse may be found in the statute does not, for me, withstand close scrutiny.

The structure of the statute, on its face, requires a recognition that " 'owner' liability and 'operator' liability denote two separate concepts and hence re-

quire two separate standards for determining whether they apply." *Lansford-Coaldale*, 4 F.3d at 1220. " 'CERCLA's language . . . indicates an intent to hold a corporation liable for the environmental violations of its subsidiaries and sister corporations, if it is otherwise determined to have operated the facility in question.' " *Schiavone*, 79 F.3d at 255 (quoting *Lansford-Coaldale*, 4 F.3d at 1221 n. 11). As the *Kayser-Roth* court observed,

> Congress, by including a liability category in addition to owner ("operators") connected by the conjunction "or," implied that a person who is an operator of a facility is not protected from liability by the legal structure of ownership. Given this grammatical construction and the broad definition of "person," corporate status, while relevant to determine ownership, cannot shield a person from operator liability.

Kayser-Roth, 910 F.2d at 26; *see Schiavone*, 79 F.3d at 254. In short, direct CERCLA liability under subsection (a)(2) may be predicated on one's status as an owner or on one's status as an operator.

Alternatively, of course, a parent corporation may also be *derivatively* liable if circumstances warrant piercing the corporate veil in order to treat that parent corporation as an owner, when its subsidiary is in fact the owner. The majority opinion conflates and confounds the two types of liability, which are analytically distinct, and erroneously concludes that the latter is the exclusive basis for liability. *See Sidney S. Arst Co.*, 25 F.3d at 420; *cf. Schiavone*, 79 F.3d at 253. As a result, the majority's analysis founders on a perceived tension between the standard

of a derivative liability arising out of common-law principles of corporate law and the standard of direct liability arising out of an application of the statutory language of CERCLA. The tension is chimerical. The statute explicitly provides for distinct, direct operator liability, and "the basis for such operator liability is wholly independent of any liability on the part of" the subsidiary, *Schiavone*, 79 F.3d at 254; it is a direct liability that "stem[s] directly from [the parent's] control over the plant," that is, its own actions as an operator, *id.* The mere fact that *derivative* owner liability requires a veil-piercing analysis simply does not speak to the appropriate analysis of *direct* operator liability.

As previously alluded to, many courts have analyzed the issue of direct operator liability of a parent corporation. Most have followed the approach of *Kayser-Roth*, in which the court declared that "[t]o be an operator requires more than merely complete ownership and the concomitant general authority or ability to control that comes with ownership. At a minimum it requires active involvement in the activities of the subsidiary." 910 F.2d at 27. "This standard requires an investigation into the relationship between the parent and subsidiary, in order to reveal the requisite level of corporate involvement." *John S. Boyd*, 992 F.2d at 408. Thus, the degree of control required is "more . . . than simple ownership and the general authority or control that comes with it." *Certain Underwriters*, 90 F.3d at 674. In *Lansford-Coaldale*, 4 F.3d 1209, the court embraced the *Kayser-Roth* standard, emphasizing that "operator liability may be established even without evidence that a [parent] corporation controlled the environmental

decisions of an affiliated corporation as long as there exist other factors which sufficiently demonstrate pervasive control." *Id.* at 1222 n. 13. Similarly, in *Jacksonville Electric*, 996 F.2d 1107, the court agreed that the test for direct parent corporation liability as an operator was whether the parent " 'exercises actual and pervasive control of the subsidiary to the extent of actually involving itself in the daily operations of the subsidiary. Actual involvement in decisions regarding the disposal of hazardous substances is a sufficient, but not a necessary, condition to the imposition of operator liability.' "*Id.* at 1110 (citation omitted). As is clear from the language of these cases, and as the *Kayser-Roth* court emphasized, it would "obviously not [be] the usual case that the parent of a wholly owned subsidiary is an operator of the subsidiary." *Kayser-Roth*, 910 F.2d at 27; *see John S. Boyd*, 992 F.2d at 408.

Among the many courts that have recognized that a parent corporation may be directly liable as an operator under section 107(a)(2), there has been a difference of opinion "as to whether operator liability should be predicated on the actual control one corporation has over the other, or whether the corporation's capacity or authority to control is sufficient." *Lansford-Coaldale*, 4 F.3d at 1220. The minority view has been adopted by the Fourth and Ninth Circuits, which would hold a parent corporation directly liable as an operator not because the parent corporation actually controlled the subsidiary, but rather because it had the authority to do so. *See, e.g., Nurad*, 966 F.2d at 842; *Kaiser Aluminum*, 976 F.2d at 1341. Those courts have justified their test as "one which properly declines to absolve from

CERCLA liability a party who possessed the authority to abate the damage caused by the disposal of hazardous substances but who declined to actually exercise that authority by undertaking efforts at a cleanup." *Nurad*, 966 F.2d at 842.

This view, I think, goes too far, because it assigns liability to the parent corporations beyond that intended by Congress. But in holding, as the majority of circuits have, that a parent corporation may be liable when it actually operates the facility in question, a court simply faithfully interprets plain statutory language.

Only the Fifth Circuit has adopted the limited view of operator liability described in the majority opinion here, in which the corporate form of the alleged operator is dispositive. The *Joslyn* court framed its inquiry as being whether to "impose direct liability on parent corporation for the violations of their wholly owned subsidiaries." *Joslyn*, 893 F.2d at 81. This somewhat disingenuous framing of the question ignores the direct link contemplated by the majority of other courts that have discussed operator liability, and suggests that operator liability for parent corporations, like owner liability, would simply be another type of derivative liability, albeit of a less demanding nature than corporate-veil-piercing. The *Joslyn* court reasoned that because "CERCLA does not [explicitly] define 'owners' or 'operators' as including the parent company of offending wholly-owned subsidiaries," *id.* at 82, there can be no operator liability for parents in the absence of veil-piercing. This analysis completely misses the point, which is that since a parent corporation is certainly within the statutory definition of "person," the relevant

question is simply whether the particular corporation was, in fact, an operator of the facility in question. Thus, the *Joslyn* court's invitation to Congress to "extend liability to parent corporations" if it wishes to do so, *id.* at 83, is simply meaningless. It is obvious that CERCLA *does* extend liability to all corporations, including parent corporations, so long as they satisfy the statutory prerequisite that they be operators. I note, too, that another panel of the Fifth Circuit, in a case decided after *Joslyn*, observed in *dicta* that individual shareholders or officers could be held directly liable as an operator, when "they themselves actually participate in the wrongful conduct prohibited by the Act," and recognized that "this personal liability is distinct from the derivative liability that results from 'piercing the corporate veil.'" *Riverside Mkt. Dev. Corp. v. International Bldg. Prods., Inc.*, 931 F.2d 327, 330 (5th Cir. 1991). The *Riverside* holding indicates, at a minimum, a reluctance within the Fifth Circuit to broadly apply *Joslyn*.

In sum, I conclude, as the district court did, that a parent corporation may be held directly liable as an operator of a contaminating facility under section 107(a)(2) if the facts of the case show that its domination and control of the subsidiary corporation ostensibly operating the facility is so pervasive that the parent is the operator in fact.

B.

CPC's Liability Under Section 107(a)(2)

In addition to generally repudiating the possibility of direct operator liability for parent corporations, which has been adopted in a majority of circuits con-

sidering the question, my colleagues have a factual dispute with the district court. That is, given my conclusion that CERCLA plainly contemplates the possibility of direct operator liability for parent corporations, the analysis necessarily turns to whether such liability is appropriately imposed here: whether CPC, as a factual matter, operated the facility. My colleagues acknowledge that, *arguendo*, "where the parent directly operates the facility itself, either independently of its subsidiary, or as an actual co-operator alongside the subsidiary," liability would be appropriate, but they assert that this theory "is not the one relied upon by the district court and, in any event, is not supported by the facts in the record before us." (Maj. op. at 581.) This assertion simply belies the record and the district court's opinion, and further, it fails to recognize that our review on this point is limited to review for clear error. *Lansford-Coaldale*, 4 F.3d at 1219; *John S. Boyd*, 992 F.2d at 408; *Kayser-Roth*, 910 F.2d at 27.

The district court found that CPC, Ott II's parent corporation, so totally and completely controlled Ott II that CPC was the actual operator of the contaminating facility in Dalton Township, Michigan. There is an abundance of evidence in the record to support this factual finding, and in all events, not even my colleagues claim it is clearly erroneous. It follows, therefore, as the district court found, that CPC is directly liable under section 107(a)(2) as the operator of the site. I agree.

Section 107(a)(2) provides that a parent corporation is liable if it is the operator-in-fact of the facility as indicated by the extent of its domination and control of the subsidiary, the ostensible operator. The

district court pointed out that some of the factors relevant to deciding whether the parent is the operator-in-fact include considerations such as the parent corporation's involvement in the subsidiary's board of directors and daily operations, and the parent corporation's control over the subsidiary's policy making in areas such as personnel, finance, and waste disposal. Also relevant are the facts leading up to the subsidiary's origin and the reasons for its existence, and the parent's level of financial monitoring and its cooperation or consolidation with the subsidiary's accounting, legal, and research functions.

The specific facts with regard to CPC, as found by the district court, are these:

From CPC's acquisition of Ott II in October 1965 through April 1966, all four directors on Ott II's board were CPC officers. Over the next three and one-half years, at least three of the eight board members were officers of CPC, and for the following two and one-half years, until CPC sold Ott II, CPC officials comprised the majority of the then eleven-director board. At all times during Ott II's existence, the chairman of its board was a high-level CPC executive, appointed by CPC's president. In addition, the managers of Ott II who exerted active control over the subsidiary's day-to-day activities also were officers of CPC. Arnold Ott, who had been chief executive officer of Ott I, continued as Ott II's chief executive officer until 1969, during which time he also was CPC's vice president for scientific research and president of CPC's development company, a subsidiary with oversight responsibility for several CPC subsidiaries including Ott II. In addition, James Eiszner, who had been Ott I's vice president of marketing, served as Ott

II's president from 1967 to 1970. During Eiszner's tenure with Ott II, he also served as vice president of CPC's development company, and eventually became CPC's chief executive officer. Moreover, Eiszner, in particular, was criticized during his tenure as an Ott II official for paying too much attention to his CPC responsibilities and not enough attention to Ott II. Beverly Warner served as Ott II's chief executive officer from 1970 until it was sold in 1972, at the same time serving as president of CPC's development company.

Not only did CPC participate in Ott II's environmental matters via the CPC's environmental affairs director, G.R.D. Williams, but it was instrumental in setting Ott II's environmental policies. For example, because Williams did not believe Ott II needed a biological waste treatment facility, Ott II officers abandoned presenting plans for such a facility at a meeting with the state of Michigan. Moreover, Williams repeatedly controlled the interaction between Ott II officials and state and federal regulators, and instructed Ott II's officers "to consult with CPC before responding to regulatory questionnaires or other inquiries." *CPC Int'l, Inc. v. Aerojet-General Corp.*, 777 F.Supp. 549, 561 (W.D. Mich. 1991). Finally, as the district court found, CPC's involvement in Ott II's financial affairs involved more than mere review and oversight. For example, CPC made loans to Ott II in excess of $5 million, while assuming many of Ott II's existing loans. In addition, CPC commingled its funds with Ott II's funds. CPC also limited the amount of capital expenditures that Ott II could approve without further approval by CPC's board of directors. As to personnel matters, CPC repeatedly

participated in Ott II's labor negotiations with local unions.

Based on these and many other findings, the district court concluded that "[t]he evidence shows a level of participation and control by CPC that exceeds the bounds of an interested investor and enters the realm of an active operator." *Id.* at 575. These findings are amply supported in the record. As I have said, my colleagues do not claim they are clearly erroneous. Accordingly, the district court's conclusion that CPC was directly liable under section 107(a)(2) as an operator should be affirmed.

II.

Aerojet's Liability Under Section 107(a)(1)

The district court found Aerojet liable as a present "owner" of a contaminated facility under section 107(a)(1). It did so after finding that the facts justified piercing the corporate veil that thinly shielded Cordova/Michigan from Aerojet. My colleagues hold that the district court erred because it misapplied Michigan law: "[The district court's findings do] not suggest that the company acted to subvert justice or with fraudulent intent or otherwise sought to distort the legitimate purposes of the corporate form." (Maj. op. at 582.)

While there is no question that fraudulent intent or a subversion of justice justifies piercing the corporate veil, there is ample authority under Michigan law for finding parent corporation liability through veil piercing for a less egregious reason, such as unjustified use of the corporate form. Indeed,

the Michigan Supreme Court has only recently restated the applicable rule:

> Michigan law presumes that, absent some abuse of corporate form, parent and subsidiary corporations are separate and distinct entities. This presumption, often referred to as a "corporate veil," may be pierced only where an otherwise separate corporate existence has been used to "subvert justice or cause a result that [is] contrary to some other clearly overriding public policy." *More specifically, Michigan courts have generally required that a subsidiary must "become 'a mere instrumentality' of the parent" before its separate corporate existence will be disregarded.*

Seasword v. Hilti, Inc., 449 Mich. 542, 537 N.W.2d 221, 224 (1995) (emphasis added) (citations omitted); *see Wells v. Firestone Tire and Rubber Co.*, 421 Mich. 641, 364 N.W.2d 670, 675 (1984); *Herman v. Mobile Homes Corp.*, 317 Mich. 233, 26 N.W.2d 757, 762-63 (1947); *Potter v. Michigan Bell Tel. Co.*, 246 Mich. 198, 224 N.W. 438, 439 (1929). But the most instructive language of *Seasword*, for purposes of this case, is in the court's illustrative listing of "relevant factors ... showing that a subsidiary is a 'mere instrumentality' of its parent":

> [T]he parent and subsidiary shared principal offices, or had interlocking boards of directors or frequent interchanges of employees, that the subsidiary is the parent's exclusive distributing arm, or the parent's revenues are entirely derived from sales by the subsidiary.

Seasword, 537 N.W.2d at 224 n. 10.

The coincidence between these hypothetical factors and the reality of Aerojet's relationship with its subsidiaries is, to put it mildly, striking. The district court found that Aerojet was the 100% shareholder of Cordova/California; that Cordova/California, in turn, was the sole shareholder of Cordova/Michigan; and that the boards of directors of Cordova/California and Cordova/Michigan were titular only, not even convening for meetings. At least twenty Aerojet officers simultaneously held the same or nearly identical positions in Cordova/California and Cordova/Michigan. Aerojet so completely controlled the finances of all companies that neither Cordova/California nor Cordova/Michigan were permitted to maintain separate bank accounts. In addition, there was evidence that Aerojet used Cordova/Michigan by transferring to Cordova/California millions in worthless debt owed to Aerojet by Cordova/Michigan, effectively canceling debt owed by Aerojet to Cordova/California. These findings are supported by the record and are not clearly erroneous. The evidence established that Cordova/Michigan operated as a "mere instrumentality" of Aerojet.

Even more compelling are the findings of the district court regarding Cordova/Michigan's corporate purpose. When Aerojet began negotiations with MDNR for the Dalton Township property, Aerojet negotiated side-by-side with its then-unincorporated division, Cordova. After Aerojet entered two short-term stipulations with MDNR, and merely eleven days before the sale was concluded, Aerojet incorporated Cordova as a wholly-owned subsidiary. Although Aerojet had initially drafted the stipulation and consent order with MDNR, it was "Cordova

Chemical Company" that actually signed the agreement. Then, in November 1978, with the remodeling of the facility complete and manufacturing about to begin, Cordova/California incorporated Cordova/Michigan, transferring to it Cordova/California's ownership of the facility. Despite the separate corporate form of Cordova/Michigan, throughout operations, Aerojet actively participated in negotiations with prospective buyers for the possible sale of the facility. Once Cordova/Michigan ceased operations at the site, it was Aerojet that took responsibility for leasing portions of the site to third parties. It is clear that Aerojet took pains to insulate itself from environmental liability for the situation they knew existed at the site. Aerojet admits as much in its brief:

> By using well-capitalized, non-fraudulent, separate corporate subsidiaries, such as Cordova/California and then Cordova/Michigan, Aerojet could justify an attempt to reclaim and make the waste Site productive without risking all of its corporate assets. A rule of law imposing enormous environmental liability on parent corporations whose subsidiary neither perpetrated a fraud nor contributed to actual contamination would result in contaminated waste sites being permanently abandoned as unproductive, orphan properties, because no rational corporate officer could support a decision to rehabilitate a contaminated site if such liability were unavoidable.

Thus, Aerojet admits that Cordova/Michigan was established solely as a facade, to avoid any legal obligation to pay for further environmental cleanup at

the site. Under Michigan law, its admission is sufficient to justify piercing the corporate veil. *See Potter*, 224 N.W. at 440. As Aerojet points out, it is possible that a refusal to allow a prospective purchaser of a contaminated site to avoid liability will result in a scarcity of willing buyers. Certainly, both EPA and MDNR have a substantial interest in locating conscientious purchasers, who are willing to reclaim environmentally corrupt facilities. However, there is no evidence that the Michigan courts would view this interest as an exception to the state's veil-piercing standard, especially in light of the competing interest in imposing environmental cleanup costs on private industry rather than on taxpayers. Congress certainly was not deterred by this argument, given its balancing of interests in favor of imposing liability on new owners. Moreover, Aerojet and the Cordovas are not blameless, as they would have the court believe. The district court found that the entities actively contributed to the contamination and then failed to take remedial action, despite knowledge that contamination was continuing to migrate.

Accordingly, the district court's conclusion that, by piercing the corporate veil, Aerojet may be held liable as an *owner* under 42 U.S.C. § 9607(a)(1) should be affirmed.

I further agree with the district court that Aerojet was directly liable as an *operator* under section 107(a)(2):

> In light of the same facts that were probative in concluding Aerojet is liable under section 107(a)(1), the court concludes that Aerojet operated the site through active participation and

pervasive control over the businesses of both Cordova/California and Cordova/Michigan.

As with CPC's involvement with Ott II, Aerojet's participation and control over the board, management and decision-making at Cordova/California and Cordova/Michigan shows that the parent operated the facility. Aerojet's conduct toward its subsidiaries extended well beyond the activities that are merely indicative of a parent's general oversight of a wholly owned subsidiary.

Accordingly, the court concludes the [sic] Aerojet is directly liable as an operator under section 107(a)(2).

CPC Int'l, Inc., 777 F.Supp. at 580.

III.

Third-Party Defense Under Section 107(b)(3)

Finally, I do not agree that the district court should be required, upon remand, to "revisit its treatment of the [third-party] defense raised by Aerojet, Cordova/California, and Cordova/Michigan" under section 107(b)(3). (Maj. op. at 582-83.) To succeed under section 107(b)(3), the defendants are required to prove *all* four elements of a third-party defense, which are:

1. That they did not contribute to the contamination;

2. That they were not in a direct or indirect contractual relationship with any person who, in connection with the contractual relationship, caused the contamination;

3. That they exercised due care throughout their ownership or operation of the contaminating facility; and

4. That they protected against those acts and omissions of the polluting persons, and the consequences of those acts and omissions, that were foreseeable.

See 42 U.S.C. § 9607(b)(3); *see also Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 325 (7th Cir. 1994).

The district court found that the defendants failed to carry their burden on all four elements of the section (b)(3) defense. My colleagues, in desiring that the district court "revisit its treatment of the defense" raised by the defendants, address only the "contractual relationship" ground. Even if the district court erred in its treatment of that element of the defense, its findings that the defendants have not carried their burden of proving the remaining three elements of the section 107(b)(3) defense, which my colleagues do not question, is amply supported in the record.

The district court committed no clear error in finding that the defendants demonstrated neither the exercise of due care nor the use of appropriate precautions. For example, in a May 1980 environmental risk report covering Aerojet and several subsidiaries including Cordova/Michigan, the defendants repeatedly stated their intent to take a

head-in-the-sand approach with respect to the contamination problem:

> The most significant environmental problems associated with the facility are those relating to the residues of past industrial occupants of the site. Management has adopted the position that any injury to others arising out of contamination from these residues is the responsibility of the State of Michigan Department of Natural Resources and that, accordingly, Cordova should insulate itself from any knowledge of, or involvement in monitoring these wastes.

The report went on to acknowledge that waste drums remained buried, despite completion of MDNR's removal efforts. Moreover, the report acknowledged that the stipulation entered into by Cordova and MDNR was never intended to resolve the contamination problem. In describing the responsibilities assumed by the parties under the stipulation, the report admitted that MDNR's duties were limited to removing 8700 drums and a portion of the contaminated soil and sludge, and that the stipulation's hold-harmless clause relieved the defendants only of liability arising out of these specified removal efforts. In addition, as the report acknowledged, the MDNR absolved the defendants of liability relating to procurement of an alternative community water source.

As the district court pointed out, and as the report confirms, the stipulation did not resolve responsibility for the remaining drums and contaminated soil and sludge, as well as responsibility for groundwater contamination. In this regard, the report specifically opined:

> Between 65 and 100 monitoring wells for testing groundwater were either installed by Story or have been installed more recently under a State/Federal study of groundwater contamination at the site. The study is being carried out by several consulting organizations under contract to the state. Cordova management believes the studies show little or no contamination but has avoided any participation or liaison with the study teams. . . . Because of the possibility that Cordova's potential liability for groundwater contamination may have survived the Consent Order, it would appear desirable for Cordova management to keep abreast of current monitoring results. In addition, although a high chloride content would show continuation of problems from the old Story wastes, a high sulphate concentration would indicate see page problems arising out of Cordova's current operations.

Fully aware that waste drums remained buried beneath the site and that the majority of the contaminated soil had not been removed, and cognizant of groundwater contamination to which they may have been contributing, the defendants believed the solution to these problems was to don blinders. Their willful blindness can hardly be characterized as the exercise of due care.

For the same reasons, it cannot be said that the defendants took adequate precautions to protect against the consequences of Ott II's and Story's omissions and acts. While the parties, in their briefs, debate whether reimplementation of the purge wells would have been an adequate precaution, they overlook the big picture. The defendants, fully aware that

contamination problems on their property were not being addressed, chose to take no precautions to protect against the foreseeable consequences of these problems—namely, further migration.

Accordingly, because the defendants have failed to prove at least two of the requisite elements of the third-party defense, the district court properly held that they were not entitled to invoke it. It is simply unnecessary to consider whether they sustained their burden regarding the remaining two elements, including whether any of the pollution was the act of a third party "in connection with" the contractual relationship with the defendants.

IV.

The judgment of the district court should be affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Nos. G89-10503 CA, G89-961 CA

CPC INTERNATIONAL, INC., PLAINTIFF

v.

AEROJET-GENERAL CORPORATION

CORDOVA CHEMICAL COMPANY, CORDOVA CHEMICAL COMPANY OF MICHIGAN, AND MICHIGAN DEPARTMENT OF NATURAL RESOURCES, DEFENDANTS

UNITED STATES OF AMERICA, PLAINTIFF

v.

CORDOVA CHEMICAL COMPANY OF MICHIGAN, CORDOVA CHEMICAL COMPANY OF CALIFORNIA, AEROJET-GENERAL CORPORATION, CPC INTERNATIONAL, INC., AND DR. ARNOLD C. OTT, DEFENDANTS

CPC INTERNATIONAL, INC., THIRD-PARTY PLAINTIFF

v.

COMMERCIAL UNION INSURANCE COMPANY, ET AL., THIRD-PARTY DEFENDANTS

[Filed: Aug. 27, 1991]

HILLMAN, Senior District Judge.

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I. INTRODUCTION

This consolidated action involves a series of claims brought under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.* (1988). The parties are litigating who must pay past and future costs incurred in the environmental cleanup of the soil, surface water and groundwater surrounding a dormant chemical manufacturing plant that has become one of the nation's most severely contaminated areas.

Following denial of summary judgment on liability issues,[1] the CERCLA liability phase of this case was tried before the court over 15 days in May and June 1991. This opinion sets forth the court's findings of fact and conclusions of law regarding CERCLA liability.

The parties participating in the liability phase were the United States; CPC International, Inc. ("CPC"); the Michigan Department of Natural Resources ("MDNR"); and Aerojet-General Corporation ("Aerojet"), along with its two wholly owned subsidiaries, Cordova Chemical Company and Cordova Chemical Company of Michigan (collectively, "the Cordova defendants").[2]

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[1] By prior order of the court, this case has been separated into three phases: liability, remedy and insurance coverage. *See* Order, November 14, 1990. The court denied nine dispositive motions filed with respect to liability. *See* Bench Opinion, February 4, 1991 & *CPC Int'l, Inc. v. Aerojet-General Corp.*, 759 F.Supp. 1269 (W.D. Mich. 1991).

[2] The parties announced on the morning of trial that claims had been settled against another party, Arnold Ott. The court is currently awaiting presentation of a consent decree in

CPC, MDNR and the Cordova defendants each defended theories of liability advanced by the United States or other defendants under CERCLA's liability provisions in section 107(a) of the statute.[3] 42 U.S.C. § 9607(a). The court heard live testimony from 29 witnesses, received all or part of dozens of depositions, and admitted more than 2,300 trial exhibits. Following the trial, each party submitted proposed findings of fact and conclusions of law. On June 28, 1991, the parties delivered closing arguments.

After careful consideration of all the evidence and arguments set forth, the court makes the following findings of fact and conclusions of law on the issues of CERCLA liability, in accordance with Fed. R. Civ. P. 52(a).[4]

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accordance with CERCLA's settlement provisions, 42 U.S.C. § 9622 *et seq.*

[3] On April 30, 1991, the state filed a motion to dismiss based on eleventh amendment immunity all state-law claims brought against it by Aerojet, Cordova/California and Cordova/Michigan. On May 24, 1991, the court granted the motion in an opinion and order dismissing without prejudice claims for breach of contract, promissory estoppel, negligent misrepresentation and specific performance. *CPC, International, Inc. v. Aerojet-General Corp.*, 764 F.Supp. 479, 482 (W.D. Mich. 1991).

[4] CERCLA liability, when it attaches is joint and several unless a defendant proves that the harm is divisible. *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F.Supp. 823 (W.D. Mo. 1984), *aff'd in part and rev'd in part on other grounds*, 810 F.2d 726 (8th Cir. 1986); *United States v. Ottati & Goss, Inc.*, 630 F.Supp. 1361 (D.N.H. 1985). However, under a provision of CERCLA added by Congress in 1986, a potentially liable party may seek contribution from any other potentially liable party for a share of the response costs. 42 U.S.C. § 9613(f)(1). In allocating response costs in a contribu-

II. FINDINGS OF FACT

A. Background

1. Ownership

The site of contamination that is the subject of this litigation is located at 500 Agard Road in Dalton Township, Michigan, ("the site"), near Muskegon in a primarily rural area in the western part of the state. Groundwater underneath the site flows through

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tion action, a court has broad discretion to use equitable factors as it deems appropriate. *United States v. R.W. Meyer, Inc.*, 932 F.2d 568 (6th Cir. 1991).

In this case, the parties have advanced contribution claims against each other, seeking to reduce the amount of any liability that may attach. As previously indicated to the parties, the court is electing to defer until after the remedy phase findings of fact and conclusions of law with respect to allocation of liability. After the remedy phase, the court will have heard evidence regarding the extent of the harm caused by hazardous waste disposal as well as the cost of the remedy. At that time, the court will be able to reach an equitable decision regarding how cleanup costs should be allocated among liable parties.

Deferring allocation decisions until after the remedy phase is consistent with the legislative history of section 113(f)(1). The House Committee that drafted the provision stated, "*[A]fter all questions of liability and remedy have been resolved*, courts may consider any criteria relevant to determining whether there should be apportionment." H.R. 253(III), 99th Cong., 2d Sess. 19, (1985), *reprinted in* 1986 U.S.Code Cong. & Admin. News 3038, 3041-42 (emphasis added). *See also Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 667-68 (5th Cir. 1989) (favoring resolution of liability issues " before deciding the more complicated and technical questions of appropriate cleanup measures and the proportionate fault of liable parties").

an aquifer in a southeasterly direction toward two waterways, Little Bear Creek and the Unnamed Tributary.

From approximately 1959 to 1986, the site was used by a series of owners as a chemical manufacturing facility for the production of a variety of synthetic organic intermediate chemicals used for pharmaceutical, veterinary and agricultural purposes.

From 1957 to 1965, the site was owned and operated by the Ott Chemical Company, a Michigan corporation ("Ott I").

From 1965 to 1972, the site was owned and operated by a wholly owned subsidiary of CPC International, Inc. ("CPC")[5], known as Ott Chemical Company ("Ott II").

In 1972, Ott II sold the site to Story Chemical Company ("Story"), a Georgia corporation. Story owned and operated the site until it was adjudicated bankrupt in 1977.

In 1977, the Michigan Department of Natural Resources ("MDNR") initiated a regulatory investigation at the site aimed at determining the extent of environmental problems and possible remedies. As part of its efforts, MDNR tried to attract a new purchaser for the site who would participate in a cleanup of the site. As a result of these efforts MDNR entered into negotiations with Aerojet-General Corporation and its subsidiary, Cordova

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[5] After the events at issue in this case, Corn Products Company changed its name to CPC International, Inc. For simplicity, "CPC" will be used in all of the court's references to the company.

Chemical Company. These negotiations were fruitful and on October 13, 1977, Cordova Chemical Company ("Cordova/California") signed a "stipulation and consent order" with MDNR that set forth obligations with respect to efforts to remedy environmental contamination problems at the site. One day later, Cordova/California, a wholly owned subsidiary of Aerojet-General Corporation ("Aerojet"), purchased the site from the Story bankruptcy trustee.

In 1978, Cordova Chemical Co. of Michigan ("Cordova/Michigan"), a wholly owned subsidiary of Cordova/California, became the owner of the site. Cordova/Michigan continues to own the site, but the facility has not been in operation since 1986.

2. Contamination

Prior to the commencement of chemical manufacturing at the site in 1957, the quality of the groundwater underneath the site was excellent.

By 1959, as a result of chemical waste disposal, the water pumped for use in the manufacturing process at the site had become contaminated. By 1964, test results showed that the groundwater flowing underneath the site had become contaminated.

As a result of chemical manufacturing and waste disposal practices at the chemical facility, the soil, surface water and groundwater at the site contain a large number of toxic chemicals.

The principal source of contamination at the site was the use of engineered, unlined lagoons at the northwestern edge of the site for chemical waste disposal. From 1959 to at least 1968, during the

Ott I and Ott II periods of ownership, wastewaters and other chemical waste used in the manufacturing process were discharged into the lagoons, where much of the contaminants seeped into the ground and water. No disposal into the lagoons occurred during the Story and Cordova periods.

During the Ott I and Ott II era, chemical waste also entered the ground through the burial and slitting of hundreds of drums in a sandy pit; numerous spills of hundreds of gallons of chemicals from train cars onto railroad tracks; frequent overflows of chemical waste at a cement-lined equalization basin; and the dumping into the woods of buckets of hazardous chemicals that had spilled during the manufacturing process. Some spills of hazardous waste also occurred during the Story and Cordova periods of ownership.

Contamination entering the ground from disposal in the lagoons or through spills then seeped into the ground and migrated away from the site via the aquifer to the southeast, ultimately reaching two waterways, Little Bear Creek and the Unnamed Tributary.

Beginning in 1965 during the Ott I period of ownership and continuing during the Ott II period, purge wells were used intermittently at the site in an attempt to treat the groundwater contamination and retard the spread of contamination away from the site.

However, after 1974 during the Story era of ownership and continuing through periods of ownership by Cordova/California and Cordova/Michigan, the purge wells were not operated for any significant time period, resulting in the continued, unchecked

spread of contamination away from the site through groundwater.

During their period of operations, Cordova/ Michigan and Cordova/California neither buried waste nor dumped it onto the ground. No chemical waste was disposed into the unlined lagoons that had been used during the Ott I and Ott II eras. Before beginning chemical manufacturing, Cordova/ Michigan repaired the equalization basin and chemical sewer system. When operating, Cordova/Michigan discharged chemical waste through off-site disposal or to a sewer that flowed to the Muskegon County treatment facility.

However, two hazardous chemicals used in small amounts by Cordova/Michigan—benzene and 1, 2 dichloroethane—are in the soil and groundwater at the site.

3. EPA's response

In 1981, the federal Environmental Protection Agency (EPA) began investigating how to remedy severe contamination problems in the ground and water at the site and surrounding area resulting from hazardous waste disposal practices at the site.

In 1982, the EPA placed the site and surrounding area on the federal government's National Priorities List of locations in need of a long-term remedial response. It is ranked 137th among this country's environmentally hazardous sites most in need of federal remedial action.

The EPA is presently continuing development of a three-phase, multi-million dollar remedial plan for the soil, surface water and groundwater at and surrounding the site.

This litigation consists of a series of consolidated claims regarding who should be liable for cleanup costs under CERCLA, 42 U.S.C. §§ 9607, 9613 *et seq.*

4. Stipulations

The parties have stipulated that the site is a "facility"; that the site contains "hazardous substances"; that "releases" have occurred and threaten to continue, as defined under CERCLA's relevant provisions; and that CPC, MDNR, Aerojet, Cordova/ California and Cordova/Michigan are "persons", as defined under CERCLA's relevant provisions, 42 U.S.C. § 9601.

B. Ownership by Ott I: 1957 to 1965

From 1957 to 1965, Ott I, a publicly traded Michigan corporation, owned and operated the site as a chemical manufacturing plant.

The company was steered by an active board of directors that was significantly involved in the management of the company. Ott I's board of directors made company decisions regarding policies, goals and directions in regular meetings which were commemorated in detailed minutes. During these meetings, the board conducted working sessions in which company officers presented comprehensive reports on the performance and activities of the various divisions.

Arnold Ott was the leading officer and director of Ott I. From the inception of Ott I in 1956 through its sale in 1965 to CPC, he served as president and chief executive officer of Ott I, and at various times served in other positions, including treasurer. He also served on the company's board of directors, which he chaired for a period of time. In addition, he was the company's largest shareholder, owning nearly 30 percent of its stock in July 1965, a time when the next largest shareholder owned only about 5 percent.

Another leading Ott I official was James Eiszner, a vice-president of marketing.

In 1963, Alexander McFarlane, CPC's chairman of the board, joined the Ott-I board. He soon became impressed by members of Ott I's management group, whom he admired for their dynamic, entrepreneurial spirit. McFarlane became interested in the possibility of tapping the scientific talent he had encountered to help CPC expand its primary business areas of corn wet-milling and consumer food products.

In the spring of 1965, McFarlane and Arnold Ott began to discuss the possibility of CPC acquiring Ott I. McFarlane was interested in bringing Ott I officials, particularly Ott and Eiszner, into the CPC management structure.

As a result of the discussions, McFarlane stepped down from the board of Ott I, and negotiations between top officials of Ott I and CPC followed in April and May 1965.

C. Ownership by Ott II: 1965 to 1972

1. Acquisition of Ott I

In June 1965, the Ott I board approved in principle an agreement and plan of reorganization for the purchase of the company by CPC.

The same month, Arnold Ott moved to New York and assumed responsibilities within CPC management. Ott initially worked with Harold Hellman, CPC's assistant to the chairman. Ott also continued to function as president, chief executive officer, and director of Ott I. Ott's move took place three months before the formal purchase of Ott I.

In September 1965, in preparation for closing on the sale, CPC created the Four Lakes Chemical Company, a wholly owned subsidiary incorporated in Delaware and capitalized with $1,000, for purposes of acquiring Ott I. The initial directors of Four Lakes were Arnold Ott and three CPC employees.

On September 22, 1965, the Four Lakes board of directs elected as its officers five people, including Ott and Eiszner, who had held identical positions with Ott I. The board also voted to change its name, effective October 1, 1965, from Four Lakes to the Ott Chemical Company ("Ott II")

Then on September 29, 1965, Ott I's assets and certain liabilities were sold to CPC's subsidiary Four Lakes, in exchange for 75,300 shares of CPC common stock.

Under the agreement, Four Lakes agreed to assume some specific liabilities of Ott I, with Ott I continuing to be responsible for those not designated.

Ott I expressly remained liable for "injury or damages to persons or property arising out of the sale of any goods, the provision of any services, or the conduct of" Ott I prior to closing. In addition, the agreement set forth that Ott I "expressly represents that it will pay, or make provision for the payment of, all liabilities and obligations of, or claims against Seller [Ott I] not expressly assumed" by CPC or Four Lakes.

The acquisition by CPC was publicized to customers, creditors, suppliers and the public.

After the sale, Ott I maintained public liability insurance for three years, but it ceased to operate as a functioning corporation. The company's name was changed to Muskegon Chemical Company.

On October 1, 1965, two days after the formal sale of Ott I, Four Lakes officially became the Ott Chemical Company ("Ott II").

Following the acquisition, Ott II functioned in a number of ways as Ott I had prior to the sale. The officers of Ott II remained identical to the officers of Ott I until March 1966. Ott II continued to use the name, "Ott Chemical Company." Ott II continued to manufacture substantially the same products. Ott II continued to sell products to nearly all of Ott I's customers. Ott II continued to employ most of the same personnel as Ott I. And Ott II continued the same chemical manufacturing operation at the same facility.

CPC nevertheless planned rapid growth for Ott II. Prior to the sale, Arnold Ott reported to the Ott I board that McFarlane and CPC president Howard C. Harder "envisage the chemical operation to reach

at least $100,000,000 in five years." Following the acquisition, Ott II's production capacity significantly increased as CPC contributed millions of dollars to expansion efforts. This increase in production, in turn, created substantially greater amounts of wastewater and chemical waste in need of disposal in the unlined lagoons, which were expanded to accommodate the additional waste.

2. Board of directors

Following its acquisition of Ott II, CPC actively participated in, and at times controlled, the policy-making decisions of its subsidiary through its representation on the Ott II board of directors.

The Ott II board of directors was an active board during CPC's period of ownership, continuing the tradition established in the Ott I era of functioning in an engaged, participatory manner. The board established policies and goals for the company. It also regularly received reports and presentations from Ott II officers, including accounts of mounting problems with waste disposal. These sessions sometimes lasted three to five hours. Far more than a rubber stamp for management, the Ott II board functioned as a major source of power and decision-making at the company.

CPC had majority control of the board for nearly three years. In the first six months following the acquisition, all four directors on the then four-member board were CPC officials, including Ott. Then, from March 1970 until the sale of the company to Story in June 1972, six of the eleven board members of Ott II were individuals with CPC positions. No

fewer than three CPC-affiliated directors served on the Ott II board at all times, and CPC, as 100- percent shareholder, controlled the selection of board members.

CPC directors serving on the Ott board reported back to CPC about Ott programs and gave approval on behalf of CPC for appropriation requests.

During CPC's entire period of ownership of Ott II, the chairman of the Ott II board was always a top-ranking CPC executive. The president of CPC had the authority to determine who served as Ott II's chairman. Arnold Ott served as chairman from 1966 to 1969 at the same time that he was a CPC vice-president and the president of CPC's development company. From 1969-1970, Eiszner was the Ott II chairman in addition to serving as a CPC vice-president. Finally, Beverly Warner served as chairman from 1970 to 1972 while also serving as president of CPC's development company.

Other CPC officials served as particularly influential members of the Ott II board. Within six months of the acquisition, CPC placed Harold Hellman, a CPC vice-president and assistant to CPC's president, on the board. James W. McKee, CPC's financial officer, served on the board from 1968 to 1969.

When the Ott II board expanded from eight to eleven members in 1970, the three additional directors were senior CPC employees, including Warner who was elected chairman and chief executive officer.

CPC executives who were not Ott II board members also occasionally attended Ott II board

meetings, including CPC's president and its chairman of the board.

CPC matters were discussed at board meetings, and Ott II board members recognized the need to consider CPC's interest and seek strong guidance from the parent company during these sessions.

The site of the Ott II board meetings regularly alternated between Ott II's headquarters in Muskegon and CPC's headquarters in New York and later Englewood Cliffs, New Jersey.

3. Management

CPC also actively participated in and exerted control over day-to-day decision-making at Ott II through representation in the highest levels of the subsidiary's management.

Although Ott II corporate officers set the day-to-day operating policies for the company without any need to obtain formal approval from CPC, CPC actively participated in this decision-making because high-ranking CPC officers served in Ott II management positions. In addition, the president of Ott II reported directly to CPC's president.

The Ott II management formulated and implemented the company's day-to-day operating policies, including sales, marketing, advertising, the purchase of raw materials, research and development, hiring and personnel policies, capital expenditures, manufacturing, and environmental matters.

Several individuals served simultaneously as top-ranking Ott II and CPC officials. In some

instances, the officials with dual roles at Ott II and CPC worked out of CPC's headquarters in New York.

Arnold Ott was one of the principal CPC officials who exerted control within Ott II management. Following his move to CPC headquarters to assume new corporate responsibilities at CPC even prior to the formal acquisition of Ott I, Ott served as president and chief executive officer of Ott II through December 1966. During this period, Ott worked from CPC's headquarters where he served concurrently as a CPC vice-president responsible for scientific research. In 1968, Ott became the first president of CPC's development company, a division with oversight responsibility for Ott II and other wholly owned subsidiaries involved in scientific development. During his tenure as president of CPC's development company, Ott also served as Ott II's chief executive officer.

James Eiszner similarly held a major position at CPC at the same time that he was an active and influential member of Ott II's management. Eiszner served as Ott II's president from 1967 to 1970, and in 1968, he became a vice president of CPC's development company, reporting directly to its president, Arnold Ott. Eiszner subsequently ascended through the ranks of CPC, where he eventually became chief executive officer.

In another instance, a high-ranking CPC official became an Ott II senior officer. Beverly Warner, who became president of the development company in 1969, assumed the position of Ott II's chief executive officer in 1970, a position he retained until the sale of Ott II to Story in 1972.

CPC officials thus played decisive roles in Ott II's policy-making structure. As top officers at Ott II, these CPC officials exerted significant control and bore ultimate responsibility over decision-making at the subsidiary in areas including waste disposal, sales, marketing, manufacturing, purchasing and personnel.

The direct involvement and influence of CPC officials in Ott II decision-making at times created controversy and strains within the subsidiary.

While serving as CPC's development company president and Ott II's chief executive officer, Beverly Warner controlled decisions including production, pricing and plant operations at Ott II actually undermined a number of Ott II programs. According to Eiszner, who eventually became CPC's chief executive officer, Warner "made some terrible, terrible management decisions which were probably what led" to the sale of Ott II in 1972.

Eiszner himself was the subject of criticism for improperly giving too much attention to CPC matters while serving in dual management roles at Ott II and CPC. At an Ott II board meeting, board members admonished Eiszner for improperly allocating too much management time to CPC.

The Ott II company airplane also was frequently unavailable for use by Ott II executives because CPC officials were occupying it for travel between their headquarters and the subsidiary.

Arnold Ott's control over Ott II matters continued even after he relinquished the Ott II presidency and served as CPC's development company president and Ott II chairman. For example, Ott singlehandedly

made the decision to move Gerald Roberts, Ott II's controller and treasurer since 1967, to a similar position with the CPC's development company in 1968. Ott also personally selected Roberts' successor at Ott II, David Hackney.

4. CPC's development company

CPC's development company also actively participated in and exerted control over policy-making at Ott II in efforts to enhance performance, shape decisions and affect personnel changes.

The development company, which had oversight responsibility for a number of CPC subsidiaries with scientific or technical specialties, served as another source of policy-making for Ott II. Prior to the closing of sale of Ott II to Story in 1972, Ott II president William T. White described to Story Chemical official Harry Forman: "Ott has been operating as part of the CPC Development Company, and, in addition, Ott has had its own Board of Directors. Thus . . . overall policy has come from two sources . . . ."

Arnold Ott and Beverly Warner served successively as president of the development company during the Ott II era, and each held positions as chief executive officer and chairman of Ott II during their respective tenures with the development company. James Eiszner served as vice-president of the development company.

The development company regularly reviewed Ott II and recommended changes on matters ranging from finances to personnel, exerting pressure to generate more profits and enhance performance. The company

sought to ensure that Ott II met profit plans and policy goals. It also decided, among other things, who would represent CPC on Ott II's board of directors.

Ott II submitted monthly financial reports to the development company and an annual financial prospectus known as the "green book" for review and approval. Top Ott II officers reported to development company officials as well as the Ott II board.

In addition, the development company conducted reviews of the subsidiary's performance that would be followed by calls for change within the subsidiary. For example, in December 1970, Arnold Ott and James Eiszner, who no longer held posts with Ott II, visited the subsidiary at Warner's request. In a December 21, 1970, memo to Warner summarizing the visit, Ott wrote, "No intent was made to be demeaning or critical, but rather to evoke constructive discussion on policy interpretation, goal definition, organization for achieving and means for directing and controlling the profit-generating process." The memo also stated that Ott and Eiszner had "admonished" the Ott II officers "to be more incisive and decisive, more frugal on authorizations of expenditures and to let all the personnel know—now—that the Company is off course and the team must win." After another review of Ott II, Arnold Ott took the unusual step of reporting the results to Warner in the form of a telegram sent to his home. It read, in part: "Am absolutely convinced that total financial capability [at Ott II] is grossly lacking. Sound fiscal management impossible. At present don't see plan to make profitable operations for first quarter of '71. Suggest replacing Hackney immediately as one element of remedy." David Hackney was subsequently replaced.

Other CPC officials engaged in similar missions to Ott II in which Ott II officials received instructions and directives on how to improve and change. Development company vice-president Kenneth W. Knief visited Ott II to discuss with Ott officials the accuracy of the subsidiary's profit plans shortly before CPC's sale of Ott II to Story. In a March 27, 1972, memo, following the visit, Knief wrote to Warner that Ott II management "had been advised not to implement any changes in activity without discussion with Englewood Cliffs," CPC's headquarters.

In sum, CPC engaged in active participation in and significant control over Ott II policy matters and decision-making both internally through representation within Ott II's management and board and externally through the supervision of CPC's development company.

5. Environmental matters

Along with its overall participation in Ott II policies through extensive involvement in Ott II's board and management and through active oversight by the development company, CPC actively participated in Ott II environmental matters.

Discussions of waste disposal problems and potential solutions was a major topic of discussion within the Ott II management structure and board that CPC at times dominated and controlled.

In addition, CPC became directly involved in environmental and regulatory matters through the work of G.R.D. Williams, CPC's governmental and environmental affairs director. Williams coordinated all pollution activities for CPC and its divisions and

subsidiaries and became heavily involved in environmental issues at Ott II.

At the suggestion of Ott board member and CPC executive Harold Hellman, Williams became involved with Ott II in 1966 when Ott II was considering waste disposal alternatives to be discussed at an upcoming meeting with the state Water Resources Commission. Hellman recommended involving Williams because he handled all CPC pollution problems and had dealt with similar waste disposal issues at another CPC subsidiary.

CPC's Williams then actively participated in and exerted control over a variety of Ott II environmental matters

In the meeting with the Water Resources Commission, Williams participated in discussions, which, as a result of his influence, did not include presentation by Ott II of plans for a biological waste treatment facility. Williams did not feel that Ott II should mention the option because he did not think it would be needed as a waste disposal alternative.

CPC's Williams also instructed Ott II officials to limit cooperation with state and federal regulators regarding waste disposal and to consult with CPC before responding to regulatory questionnaires or other inquiries. In a memo to a new Ott II vice-president for manufacturing in 1967, Ott II president Eiszner wrote that Williams "feels that delaying tactics are almost always advisable." In a 1968 memo to top-ranking Ott II officials, Williams instructed that any unannounced visit by regulators "should be stalled for advice from N.Y." and that "[a]ny questionnaires should be filled in promptly in pencil

and forwarded to Air & Water Programs for review and decision on reply." In a 1969 memo to an Ott II project engineer regarding an upcoming visit by a state regulator, Williams wrote, "As you know, it is our posture to be cooperative on the occasion of such inspections. We answer questions that are not self-incriminating, but we do not volunteer information, particularly about planned capital expenditures, production rates, sales volume and the like." In a 1971 memo regarding an upcoming federal survey to be completed by Ott II plant chemists, Williams instructed that if test results "meet acceptable levels, then the survey should be completed and forwarded by the plant manager. If they do not for any reason meet such levels, then this office should be queried with the details before the survey request is answered."

Other CPC officials also actively participated in Ott II waste disposal matters. For example, in 1970, Hanes Heller, a CPC attorney, negotiated with the state regarding Ott II's use of a county wastewater treatment system. Heller provided detailed instructions to Ott II regarding the objectives in these negotiations and indicated that CPC approval of any agreement was necessary.

6. Financial matters

CPC also exerted significant control over Ott II's finances.

Ott II prepared monthly financial reports for CPC's development company, and each year the subsidiary submitted a detailed financial plan known as the "green book" for review and approval by the parent company.

CPC functioned as Ott II's banker, advancing the subsidiary more than $5 million from 1965 to 1971. CPC also assumed a number of loans for Ott II. Ott II's funds were commingled with CPC's in a joint account.

In addition, Ott II had a limit on capital expenditures that were permitted without approval from CPC's board of directors or development company. The ceiling on capital spending that did not require parent approval was initially $5,000 in 1965 and became $200,000 in 1968.

7. Labor matters

CPC officials also actively participated in some Ott II labor matters.

In 1967, CPC officials became involved in the negotiations between Ott II and a union that had previously attempted to organize at other CPC facilities.

CPC also participated in subsequent labor negotiations in 1968 and 1970.

8. Other business matters

CPC also participated in other aspects of Ott II's business. CPC provided staff services and employee benefit programs to Ott II; filed patents; developed, in a cooperative effort between Ott II and another CPC research facility, chemicals for use by CPC; and coordinated outside and accounting services. CPC provided these services without charge to Ott II.

9. Sale of Ott II to Story

On June 9, 1972, CPC sold Ott II to Story for approximately $6.6 million in cash and a $4 million note. The transaction was made without the knowledge of the Ott II board. For six months prior to the closing, CPC operated the Ott II business for Story. Following the sale to Story, Ott II changed its name back to Four Lakes Chemical Company.

D. Ownership by Story: 1972 to 1977

On June 9, 1972, Story began its chemical manufacturing operations at the site.

By 1974, beset by financial problems, Story abandoned regular use of the purge well system installed during the Ott II era to eliminate contaminants from the groundwater. This abandonment increased the spread of contamination migrating away from the site.

In July 1976, Story filed for bankruptcy organization, and in August 1977, the company was adjudicated bankrupt.

The bankruptcy trustee responsible for the disposition of Story's assets, Maurice Edelman, assumed title on the site and attempted to find a buyer.

E. Agreement between MDNR and Cordova/ California: 1977

1. MDNR's environmental emergency

Following Story's bankruptcy in 1977, officials with the State of Michigan began to assess the severe environmental problems presented by the abandonment of the site.

Acting in their regulatory capacity, MDNR officials, together with members of the Governor's office, Public Health Department, and State Police, visited the site and discovered the extreme severity of its environmental problems.

The site's environmental problems were legion. The toll exacted by decades of hazardous waste contamination was abundantly clear. Groundwater pumped to the surface contained foam and a brownish color like root beer. The stench of chemicals permeated the air. Soil excavation revealed the taint of toxic pollution, showing purplish colors. Hundreds of chemical drums, many piled atop each other, lay around the site, randomly strewn among trees, across pavement and into sandy pits. Many of the drums and barrels were crushed, corroded and leaking, with their contents seeping into the ground. Chemical waste by-products, including thousands of broken bottles, littered the land.

Among the chemicals found at the site were potentially deadly toxics. Tanks of explosive phosgene gas, potentially deadly if released into the air, presented a serious risk to neighboring residents in the event of vandalism or an accident. Other chemicals known as probable human carcinogens

were found scattered around the site, including benzene, phenol, methylene chloride, and methyl isocyanate.

Based on these discoveries, MDNR identified five severe environmental problems at the site. The five problems were prioritized in their order of immediate danger to public health: 1) the potentially explosive phosgene gas contained in large tanks at the site; 2) a contaminated water supply in the community surrounding the site; 3) contaminated sludges at the site; 4) contaminated waste containers at the site, particularly barrels and laboratory bottles; and 5) contaminated groundwater flowing underneath the site.

Although the environmental problems at the site did not qualify as a public health emergency under state fire or public health department standards, these dire environmental conditions presented an environmental emergency for MDNR. All of these severe environmental problems were going unattended and threatened to worsen, including the spread of some of the worst groundwater contamination state regulators have encountered to date. As a result, the site posed an environmental emergency in need of prompt regulatory attention from MDNR as the state agency responsible for the protection and conservation of Michigan's natural resources.

MDNR's ability to initiate an immediate cleanup of the environmental emergency at the site was severely limited, however. In 1977, Michigan and the United States had not yet established laws creating revolving funds to provide resources to pay for agency cleanups and liability provisions to seek reimbursement from polluters, such as CERCLA and its

Michigan counterpart, "Act 307", M.C.L.A. § 299.601 *et seq.* Instead, in order to initiate cleanup of an environmentally contaminated site, MDNR needed to obtain a specific legislative appropriation for that purpose. The tools for government cleanups in Michigan were few, and the process for obtaining them was laborious.

In light of the severity of the environmental problems at the site and the unavailability of immediate resources to pay for a cleanup, MDNR, together with other state officials, initiated in early 1977 an effort to expedite legislation appropriating funds for cleanup of the site.

At the same time, MDNR became actively involved in efforts to attract a buyer for the site. The agency was interested in involving a new purchaser in the cleanup as a way of reducing the amount of state money that would be allocated by the legislature for its regulatory response.

2. Negotiations between MDNR and Aerojet's Cordova Chemical Co.

In March 1977, officials from Aerojet and its unincorporated division known as Cordova Chemical Company met with MDNR officials in Michigan to discuss possible purchase of the site. After the meeting, Aerojet elected not to acquire the property, due, in part, to its contamination problems.

Several months later, however, Aerojet had renewed interest in the site. Aerojet was looking for a facility to make ethelenimine ("EI"), a chemical used by its Cordova division in the manufacturing process. Aerojet had recently learned that EI would

soon not be available from its previous supplier. As a result, talks between officials from MDNR and Aerojet resumed.

Discussion of the existence and spread of contamination at the site was central to the negotiations between MDNR and Aerojet. MDNR had initially aimed to have its regulatory cleanup of the five environmental problems funded entirely by the site's new purchaser. In contrast, Aerojet was initially reluctant to pay for the cleanup of any contamination created by prior owners of the site.

The negotiations over the contamination focused on identifying aspects of MDNR's regulatory cleanup efforts at the site that the company would agree to finance. MDNR decided that receiving private funding for some of its cleanup efforts would be acceptable, and Aerojet determined that it would be willing to pay for some cleanup of the preexisting contamination at the site in exchange for promises with respect to future cleanup obligations.

With negotiations progressing, Aerojet signed a stipulation with Story's bankruptcy trustee on September 12, 1977, in which Aerojet agreed to pay for security and safety measures at the site for the succeeding two weeks in exchange for the right to match any offers to purchase the site during the time period. On September 29, 1977, Aerojet signed a similar agreement for two additional weeks.

On October 3, 1977, in anticipation of an imminent agreement to purchase the site, Aerojet incorporated its Cordova division. Cordova Chemical Company ("Cordova/California") became a wholly owned subsidiary of Aerojet, incorporated in California.

After Cordova/California's incorporation, negotiations over the purchase of the site between MDNR and Cordova/California culminated.

3. The stipulation and consent order

On October 13, 1977, a document entitled "stipulation and consent order" was signed by MDNR, Michigan's attorney general's office and Cordova/California. It addressed the problem of environmental contamination at the property and set forth obligations with respect to cleanup activities. The document was not a formal stipulation and consent order that received court approval or settled pending litigation.

One day later, Cordova/California formally purchased Story's assets, including the site, from the bankruptcy trustee for $50,000 and the assumption of certain debts, subject "to all liens, claims and encumbrances" on an "as is," "where is" basis. In total, Cordova/California paid about $2.5 million for the site, which had been appraised by the State of Michigan as being worth approximately $7.5 million.

The four-page stipulation and consent order set forth the entire agreement between MDNR and Cordova/California with respect to the contamination at the site and obligations between the parties for cleanup. It contained eight stipulated facts and nine terms and conditions.

The stipulated facts in the document recited the five pollution problems identified by MDNR in its initial assessment of the environmental emergency left after the Story bankruptcy, although they were not enumerated as such: groundwater contamination;

buried waste sludge; toxic waste drums and containers; water supply problems caused by contaminated residential wells; and phosgene gas.

With respect to the groundwater problem, the stipulated facts stated that:

> . . . Groundwater beneath and surrounding Story Chemical Corporation for an unknown distance has been and is continuing to be contaminated with toxic chemical wastes which originated at the Story Chemical Corporation facility . . . .
>
> . . . Toxic chemical wastes in the groundwater from Story Chemical Corporation are moving away from the property of the Corporation and may thereby also contaminate nearby surface waters of the State of Michigan.
>
> . . . There is continued leaching of toxic chemical wastes to the groundwaters of the State of Michigan as a result of the improperly disposed waste sludges buried on the site of Story Chemical Corporation.

Stipulation ¶¶ 1, 3 5.

The stipulated facts also set forth "the most reasonable methods of abating the present pollution problems" at the site:

a) Disposal of the approximately 8,700 fifty-five gallon drums of solid and liquid chemical waste by the Department of Natural Resources by means of recovery, incineration or landfilling,

b) Excavation, removal and disposal of approximately 8,000 cubic yards of solid chemical waste, sludges and contaminated soils by the Department of Natural Resources, and

c) Neutralization, or sale, removal and disposal of the phosgene by Cordova Chemical Company.

Stipulation, ¶ 8. The "most reasonable methods of abating the present pollution problems" did not mention or address the groundwater or water supply problems.

The latter half of the document was entitled "consent order", and it set forth terms and conditions agreed to by MDNR and Cordova/California. Under the consent order, MDNR agreed to remedy the waste container and sludge problems, and Cordova/California agreed to eliminate the phosgene gas and give MDNR $600,000 to defray the costs of the agency's cleanup of the waste containers, sludge and residential wells.

MDNR expressly agreed, at its sole cost and expense, to "completely remove the approximately 8700 fifty-five gallon drums from the Story Chemical Corporation facility and dispose of such drums and their contents. . . ." Consent order, ¶ 2. MDNR also expressly agreed, at its sole cost and expense, to "completely excavate and remove the approximately 8000 cubic yards of solid chemical wastes, sludges and contaminated soils. . . . [and] replace the excavated materials with clean fill." Consent order, ¶ 3.

Cordova/California expressly agreed, at its sole cost and expense, to "neutralize and dispose and/or

sell and remove all phosgene presently stored on the Story Chemical Corporation property. . . ." Consent order, ¶ 4.

Cordova/California also agreed to pay $600,000 to MDNR "to abate the pollution problems at the Story Chemical property. . . ." Consent order, ¶ 5. The order set forth a schedule for the payments and made them contingent upon MDNR obtaining legislative and gubernatorial approval.

With respect to Cordova/California's $600,000 payment and the company's responsibility or liability for the contamination at the site it was acquiring, the consent order stated:

> 6. It is anticipated that said $600,000 will be sufficient to reimburse the Department of Natural Resources fully for all costs and expenses incurred by it in connection with its obligations hereunder and, in addition, to provide at least $100,000 towards the provision of an alternative water supply system to serve residents and commercial establishments whose water supply wells are or may become affected by the groundwater contaminants emanating from the Story Chemical Corporation property. The Cordova Chemical Company shall not have any liability in the event that said $600,000 is not in fact sufficient for the intended purposes nor shall it have any responsibility whatsoever in connection with the provision of any water supply system or potable water pending availability of an acceptable water supply system to said residents and commercial establishments.

> Cordova Chemical Company shall not have any responsibility or liability in connection with any other corrective actions which the Department of Natural Resources or any other governmental agency may hereafter deem necessary or advisable in connection with the contamination emanating from the Story Chemical Corporation property, including, without limitation, the creation, maintenance and operation of any purge wells.
>
> . . . .
>
> 8. Compliance with this Consent Order shall constitute full satisfaction of all relief, civil or administrative, which might have been, or which otherwise might be obtained against Cordova Chemical Company for any contamination of groundwater or other pollution, injury, or damage, to the environment or otherwise, caused by acts or omissions of Story Chemical Corporation facilities, which acts, omissions or operations occurred prior to the effective date of this Consent Order, whether the contamination, pollution, injury or damage occurs prior to or after the effective date hereof.
>
> 9. By entering this Order the Department of Natural Resources agrees to indemnify and hold Cordova Chemical Company Harmless from any and all losses, damages, injury, costs and expenses (including reasonable attorney's fees) incurred or sustained by Cordova Chemical Company on account of or in connection with the Department's excavation, removal and disposal operations pursuant to paragraphs 2 and 3 of this Consent Order. This provision does not

apply to losses, damages, injuries, costs and expenses caused by the willful or negligent acts of Cordova Chemical Company's employees or agents.

Consent order, ¶¶ 6, 8, 9.

In sum, as a result of the negotiations that resulted in the terms and conditions of the stipulation and consent order, MDNR secured assistance and financing from Cordova/California in its regulatory effort to remedy the severe environmental problems at the site. Specifically, Cordova/California agreed to remedy the phosgene problem itself and provide $600,000 to pay for or subsidize MDNR's removal of 8,700 drums, the excavation and removal of 8,000 cubic yards of contaminated soils, and effort to remedy the water supply problem.

However, the agreement did not provide for a total cleanup of the site's severe environmental problems. Some aspects of MDNR's ongoing regulatory efforts at the site were not covered by the terms and conditions of the agreement.

In particular, MDNR and Cordova/California did not reach an agreement regarding a remedy for the groundwater contamination problem. Instead, the fate of the groundwater problems was not resolved, with MDNR left to tackle the problem as part of its overall regulatory responsibility for the site.

In addition, the stipulation and consent order did not provide for removal of all of the site's contaminated sludge. MDNR had determined that the actual quantity of contaminated soil was 71,000 cubic yards, although the stipulation and consent order only proved for removal of 8,000 yards.

Thus, the cleanup responsibilities set forth in the stipulation and consent order were not sufficient to effectuate a total cleanup at the site. The piecemeal nature of the cleanup agreements caused some consternation among MDNR staff. But agency officials had determined that it was desirable to reach an agreement that would secure some assistance and financial support from the site's new owner as the MDNR began its initial regulatory activities.

After the signing of the stipulation and consent order, MDNR obtained a legislative appropriation to pay for the cleanup. On February 6, 1978, Michigan's Governor William Milliken signed a bill appropriating $1.27 million in funds for MDNR's cleanup of the site.

The appropriation consisted of $670,000 of state money and $600,000 paid to MDNR by Cordova/California under the consent order. The bill allocated $500,000 for "barrel and sludge removal", $600,000 for "alternative water supply" and $170,000 for "new ground water purging system."

Although the bill did not allocate money for a total cleanup, the appropriation contained funding for MDNR regulatory cleanup activities at the site that were not part of the agency's express obligations under the stipulation and consent order. Specifically, the allocation of $170,000 for groundwater purging was not related to any obligations set forth in the stipulation and consent order. Instead, the $170,000 allocation for the purging system funded MDNR's own regulatory effort to begin the cleanup of groundwater contamination. The $170,000 was requested by MDNR to pay for the design, installation and first-year of operation of a purge well system.

Several legislative and gubernatorial aides who became involved in passage of the appropriations bill did not understand that MDNR was requesting funding for regulatory activities at the site that were outside of the obligations made under the stipulation and consent order. The aides had not participated in the negotiations between MDNR and Cordova/California. They also did not understand that the appropriations would not effectuate a total cleanup of the site. This lack of knowledge about the cleanup led to the drafting of three documents that contained erroneous information: a letter drafted for Governor Milliken stating that the $1.27 million bill would pay for a "total cleanup" and two legislative fiscal analyses that implied that the stipulation and consent order obligated MDNR to install a groundwater purging system by MDNR. Trial exhibits 1028, 1027, 1059.

Following passage of the bill, Cordova/California and MDNR fulfilled their cleanup obligations under the stipulation and consent order. Cordova/California neutralized and removed the phosgene gas at the site. MDNR, with private contractors, removed 8,000 cubic yards of sludge and 8,700 drums of waste.

During its cleanup activities, MDNR discovered additional drums that had been buried by previous owners and not previously identified by the state in its investigation. One of the drums exploded during excavation work. MDNR did not have funds appropriated to pay for this additional cleanup. As a result, the drums were reburied as a precautionary measure until funding for their removal could be obtained.

MDNR's attempts to address the groundwater contamination problem continued. In an April 3, 1978, "special program directive", an MDNR official, designated as a "highest" priority the task of "removal of contaminated groundwater and installation of public water supply" at the site.

MDNR subsequently commissioned studies in an attempt to determine the most effective plan for eliminating contaminated groundwater. The studies aimed to analyze the extent of the problem and the flow of groundwater in order to place purge wells in locations that would most effectively control and recapture spreading contamination. Based on the studies, MDNR determined that an effective groundwater purging system might cost $37.7 million.

In its efforts to determine the most effective way to implement a purge system, the state expended the $170,000 it had been allocated for the new purging system. As a result, MDNR was not able to initiate any actual purging operations with the appropriations.

Following MDNR's and Cordova/California's fulfillment of their cleanup obligations under the stipulation and consent order, contamination remained at the site. Groundwater contamination continued to migrate. Thousands of yards of contaminated sludge remained in the ground and continued to leech. The recently discovered barrels also remained.

F. Ownership by Cordova/California and Cordova/Michigan: Since 1977

1. Acquisition of the site

Aerojet was actively involved in Cordova/California's acquisition of the site.

A team of Aerojet officials led the initial negotiations with MDNR in March 1977. One Aerojet individual was the company's director of risk management, and another was the vice president of operations for the Cordova division.

When negotiations resumed after the Cordova division learned it would be losing its principal supplier of ethelenimine, it was Aerojet officials again who became involved. Aerojet officials and employees conducted economic, environmental, and engineering studies regarding the site to determine its compatibility with the Cordova division. Aerojet's chief negotiators were its Cordova division's controller and vice president of operations.

In addition to signing two consecutive stipulations with the bankruptcy trustee giving the company the right of first refusal to purchase the site for a two-week period, Aerojet officials drafted an initial stipulation and consent order that it presented to MDNR shortly before the incorporation of Cordova/California.

2. Incorporation of Cordova/California, Cordova/Michigan

At two significant junctures in the history of ownership of the site, Aerojet incorporated a wholly owned subsidiary to take title of the property.

Aerojet incorporated its Cordova division as Cordova/California in October 1977, just before acquisition of the site. Then, shortly before the commencement of its chemical manufacturing at the site, Aerojet incorporated Cordova/Michigan as a wholly owned subsidiary of Cordova/California.

On October 3, 1977, just eleven days before the formal purchase of the site, Aerojet incorporated its Cordova division as a wholly owned subsidiary, Cordova/California. Cordova/California was capitalized by Aerojet with $10,000 in common stock and $7.1 million in addition paid-in capital. As a result, a subsidiary of Aerojet, rather than Aerojet itself, purchased the site.

Despite the change in form, the company officials participating in the acquisition remained the same during the final stages of negotiation. Richard Swanson, Marshall Howes, and T.J. Glad, formerly the negotiators on behalf of Aerojet's Cordova division, represented Cordova/California. This sudden change in corporate form resulted in some confusion within the company. Swanson, who signed the consent order on behalf of "Cordova Chemical Company", did not know whether he signed the document on behalf of the Cordova division or Cordova/California.

After its incorporation and acquisition of the site in October 1977, Cordova/California began a major

construction project to convert the facilities into a manufacturing plant for EI, the chemical which Aerojet's Cordova division had received from an outside supplier.

Then, on November 2, 1978, with construction complete and manufacturing operations about to begin, Cordova/California created its own wholly owned subsidiary, Cordova Chemical Company of Michigan ("Cordova/Michigan"), and transferred ownership of the site to Cordova/Michigan. Cordova/Michigan was capitalized by Cordova/California with $250,000 in common stock and $2.8 million in additional paid-in capital.

As a result, a subsidiary of Aerojet's subsidiary, rather than Aerojet's subsidiary itself, owned the site at the time that chemical manufacturing commenced.

3. Aerojet's direct involvement with the site

After the incorporation of each of its two subsidiaries for operations of the site, Aerojet continued to participate directly in decision-making regarding use of the facility.

In 1978, Aerojet closely supervised the construction of additional facilities at the site that were necessary for the conversion to a manufacturing plant for ethelenimine.

From 1979 until at least 1984, Aerojet participated in periodic discussions and negotiations with prospective purchasers regarding possible sale of the site. An Aerojet vice-president of corporate development served as the companies' designated individual for meetings with prospective purchasers.

In November 1979, one year after the incorporation of Cordova/Michigan, Aerojet prepared a prospectus for review by a West German company considering acquisition of the site.

After production activities at the site ceased in 1985, Aerojet participated in the continuing management of the site and leased portions of the site to third parties. Cordova/Michigan's manager of the Muskegon site reported directly to Aerojet officials working in an unincorporated division, Aerojet Investments. The manager's budget was approved by Aerojet.

4. Integration of business

Despite their separate corporate existence, Cordova/California and Cordova/Michigan operated as a single, integrated business entity. The subsidiaries performed functions that previously had been part of the operations of Aerojet's own Cordova division prior to the incorporation.

EI manufactured by Cordova/Michigan at the site was shipped to Cordova/California's main plant for use in the production of several drug intermediates. Receiving supplies of EI was critical to the success of Cordova/California, which was the largest user of the chemical in the United States.

Integration of the businesses of Cordova/California and Cordova/Michigan extended beyond the supplying of EI. Cordova/California handled marketing services for Cordova/Michigan, including solicitation of business and the processing of orders received. Cordova/Michigan did not even retain the paperwork regarding its customers' orders. In addition to providing

marketing services for Cordova/Michigan, Cordova/California managed all payroll, management, and accounting matters for both companies. Cordova/Michigan periodically paid Cordova/California for these services.

Cordova/California also established the sales schedule for Cordova/Michigan, and Cordova/California participated in decisions regarding Cordova/Michigan's production quotas and inventory controls.

5. Board of directors

Following the separate incorporation of Cordova/California and Cordova/Michigan, the subsidiaries' board of directors were inactive and nearly non-existent. As a result, policy-making for the companies was primarily handled by Aerojet officials serving in the subsidiaries' management.

Cordova/California and Cordova/Michigan never actually held regular board of directors meetings. Benjamin Simmons, president of Cordova/California and Cordova/Michigan as well as a director of both corporations, could not recall ever attending a board of directors meeting or even that any such meeting was ever held.

The boards of Cordova/California and Cordova/Michigan were composed almost entirely of Aerojet employees, and the boards essentially functioned to consent to the policies established by management.

6. Management

Aerojet participated actively in and exerted control over day-to-day operations at Cordova/California and Cordova/Michigan through widespread representation within the management ranks of the subsidiaries. As a result, the managements of Cordova/California and Cordova/Michigan were separate from Aerojet in form, not substance.

Throughout the Cordova era, leading Aerojet corporate officers held identical or similar positions with the wholly owned subsidiaries. After the incorporation of Cordova/California and Cordova/Michigan, no major distinction among the management groups for the three companies existed.

Aerojet officials dominated the management of the Cordova subsidiaries. At least 20 different corporate officers simultaneously held identical or nearly identical positions with Aerojet, Cordova/California and Cordova/Michigan during the Cordova era. At least 25 officers held the same posts with Cordova/California and Cordova/Michigan at the same time.

The president of the three companies was the same individual on at least two occasions totalling more than four years. In addition, the president of Cordova/California and Cordova/Michigan was the same person on three occasions. Individuals who served simultaneously as officers with Aerojet, Cordova/California and Cordova/Michigan were paid by Aerojet. Other Cordova/Michigan officers were paid by Cordova/California.

Other individuals held the same or nearly identical posts in triplicate, serving simultaneously as vice

president, treasurer, assistant treasurer, secretary, and assistant secretary of Aerojet, Cordova/California and Cordova/Michigan. In addition to these positions, Cordova/California and Cordova/Michigan shared officials serving as executive vice-president and controller.

This domination occurred from the inception of the separate corporate existence of Cordova/California. Immediately after Cordova/California's incorporation, a number of Cordova division officials merely assumed identical titles and responsibilities with Cordova/California, including the president, vice-president for operations, controller, and vice-president for marketing. In short, Cordova/California was operated as it had when it was the unincorporated Cordova division; a change in form, not substance had occurred. Similarly, the separate incorporation of Cordova/Michigan merely resulted in a multiplicity of titles, not a change in the way operations functioned at the site.

Aerojet further exercised influence over the management of its subsidiaries by having top officers report directly to the parent company, rather than to the subsidiaries' board of directors. For example, Benjamin Simmons, president of Cordova/California from 1977 to 1979, reported to Aerojet president J.H. Volbrecht and senior vice-president Clay Matthews. Delores Dorsey, who served as treasurer of all three companies for nearly eight years, reported directly to Aerojet's vice-president of finance, not the directors or presidents of the subsidiaries.

Aerojet also exerted control over the management of its subsidiaries by handling personnel decisions. Aerojet officials interviewed applicants and selected

replacements for vacancies within Cordova/California and Cordova/Michigan.

In sum, Aerojet actively participated in the management and direction of Cordova/California and Cordova/Michigan through representation within their management groups, which frequently mirrored the management of Aerojet itself. As a result of this widespread involvement in the management of its subsidiaries, Aerojet participated in and controlled decision-making in all facets of the company, including sales, marketing, manufacturing and waste disposal.

7. Financial matters

In addition to Aerojet's control over day-to-day operations at the subsidiaries through domination of management, Aerojet exercised total financial control over Cordova/California and Cordova/Michigan.

Cordova/California and Cordova/Michigan lacked authority to open a bank account, a power retained solely by Aerojet. All money generated by the subsidiaries was deposited into an Aerojet account. Cordova/California and Cordova/Michigan advised customers to send payments to a California post office box belonging to Aerojet.

In 1984, Aerojet assigned $25 million in worthless debt owed to it by Cordova/Michigan to Cordova/California, which eliminated more than $13 million owed by Aerojet to Cordova/California. The agreement assigning the debt was prepared by an Aerojet attorney and signed by Cordova/California's treasurer, who did not make any independent determina-

tion of whether the agreement was in the best interest of Cordova/California.

III. CONCLUSIONS OF LAW

A. *CERCLA overview*

CERCLA liability attaches if: 1) a release of hazardous substances has occurred, 2) at a facility, 3) causing a plaintiff to incur response costs, 4) and the defendant is a responsible party as defined under section 107(a), 42 U.S.C. § 9607(a). *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 668 (5th Cir.1989); *United States v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373 (8th Cir.1989); *CPC Int'l Inc. v. Aerojet-General Corp.*, 731 F.Supp. 783, 786 (W.D.Mich.1989).

In this liability trial, the parties stipulated to the first three elements of liability, including that each party has incurred response costs in connection with the cleanup at the site. As a result, the central liability issue is whether CPC, MDNR, Aerojet, Cordova/California or Cordova/Michigan are responsible parties under section 107(a).

Section 107(a) establishes four bases for CERCLA liability. It provides:

> Notwithstanding any other provisions or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
>
> (1) the owner and operator of a . . . facility,
>
> (2) any person who at the time of a disposal of any hazardous substance owned or operated

> any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility . . . owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable. . . .

42 U.S.C. § 9607(a).

In this action, the parties have invoked the first three of these liability provisions in bringing their claims: liability under section 107(a)(1) as a present owner and operator; liability under section 107(a)(2) as a past owner and operator at a time of a disposal; and liability under section 107(a)(3) as an arranger for disposal. Because the parties have stipulated that each is a "person" as defined under CERCLA, the question of their respective liability turns solely on whether status as a present owner and operator, past owner or operator at a time of disposal or arranger for disposal applies.

In applying these liability provisions to the facts of this case, the court is mindful that CERCLA

is a broadly remedial statute. Although some of CERCLA's provisions are vague and its legislative history sparse, the statute clearly aims to achieve prompt cleanup of hazardous waste sites by placing the ultimate financial responsibility for cleanup on those responsible for the pollution. *J.V. Peters & Co. v. Administrator*, 767 F.2d 263, 264 (6th Cir.1985); *Walls v. Waste Resource Corp.*, 761 F.2d 311, 318 (6th Cir.1985). As one court stated after examining the statute's legislative history, "Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created." *United States v. Reilly Tar & Chemical Corp.*, 546 F.Supp. 1100, 1112 (D.Minn.1982).

In light of CERCLA's remedial goals, the court is obligated to construe the statute's liability provisions broadly to avoid frustrating its legislative purpose. *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1045 (2d Cir.1985); *United States v. Conservation Chemical Co.*, 619 F.Supp. 162, 192 (W.D.Mo.1985); *United States v. Mottolo*, 605 F.Supp. 898, 902 (D.N.H.1985). To the extent that liability under CERCLA is greater than under common law principles of tort and corporations, it is the result of CERCLA's statutory language and legislative intent, which the court is bound to follow unless and until it is altered by Congress.

B. Conclusions of law regarding CPC liability

1. Claims against CPC

The United States, MDNR and the Cordova defendants claim that CPC is liable under section 107(a)(2)

as a past owner or operator of the site. The parties claim that CPC as a parent corporation is liable because of its involvement with its former wholly owned subsidiary, Ott II, which owned the site from 1965 to 1972. The parties also allege that CPC should be held liable because Ott II is the successor corporation of Ott I.

2. Section 107(a)(2) "operator" liability

a. Parent corporation liability under section 107(a)(2)

After studying the statute, prior case law[6] and the critical literature on the subject[7], it is clear to the court that section 107(a)(2) liability may attach to a

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[6] A number of courts have recognized that parent corporations may be liable in CERCLA cases under limited circumstances as past owners or operators of sites contaminated by their subsidiaries. *See, e.g., United States v. Kayser-Roth Corp.*, 724 F.Supp. 15 (D.R.I.1989), *aff'd*, 910 F.2d 24 (1st Cir.1990), *cert. denied*, 498 U.S. 1084, 111 S.Ct. 957, 112 L.Ed.2d 1045 (1991); *Mobay Corp. v. Allied-Signal, Inc.*, 761 F.Supp. 345 (D.N.J.1991); *United States v. Nicolet, Inc.*, 712 F.Supp. 1193 (E.D.Pa.1989); *In re Acushnet River & New Bedford Harbor*, 675 F.Supp. 22 (D.Mass.1987); *Idaho v. Bunker Hill Co.*, 635 F.Supp. 665 (D.Idaho 1986); *Colorado v. Idarado Mining Co.*, 1987 WL 56460, 1987 U.S.Dist.Lexis 14254 (D.Colo.1987). *Contra Joslyn Corp. v. T.L. James & Co., Inc.*, 696 F.Supp. 222 (W.D.La.1988), *aff'd*, 893 F.2d 80 (5th Cir.1990).

[7] *See, e.g.*, Aronsky & Fuller, "Liability of Parent Corporations for Hazardous Substance Releases under CERCLA", 24 U.S.F.L.Rev. 421 (1990); Allen, "Refining the Scope of CERCLA's Corporate Veil-Piercing Remedy", 6 Stan. Envtl.L.J. 43 (1986-87); Note, "Liability of Parent Corporations for Hazardous Waste Cleanup and Damages", 99 Harv.L.Rev. 986 (1986).

parent corporation in two ways. The first basis for liability of a parent corporation is direct liability under the "operator" language of CERCLA's section 107(a)(2). The second basis for liability is through common law veil-piercing, which may arise in any liability case involving a corporate defendant.

In determining that parent corporations may be held directly liable under CERCLA, the court relies on the language of the statute itself. Section 107(a)(2) of CERCLA holds liable "any person who at the time of disposal of any hazardous substances owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607(a)(2). The statute defines "owner or operator" circuitously to mean:

> . . . (ii) in the case of an onshore facility . . . any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility.

42 U.S.C. § 9601(20).

Though lacking in specificity, the plain language of CERCLA makes it unmistakably clear that direct liability may attach to parties other than the actual

owners of hazardous waste facilities.[8] To hold that actual ownership is mandated by CERCLA's liability provisions, a court would have to disregard the express language that makes liable those persons who have owned *or operated* a contaminated facility. Thus, reading the statute to employ only traditional concepts of ownership and liability through veil-piercing would require a court to ignore not only the statute's broadly remedial intent, but also its explicit words.[9] As a result, CERCLA liability may attach to parent corporations that have acted in a manner that constitutes operation of a facility even though they have not actually owned the site.

Determining what kind of activity by a parent corporation creates liability as an operator under section 107(a)(2) is a more difficult question.

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[8] Courts have held that a number of persons who may not have held legal title to a hazardous waste facility may be liable for its cleanup. *See, e.g., Kayser Roth*, 910 F.2d at 27 (parent corporations); *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir.1990) (secured creditors); *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F.Supp. 984 (D.S.C.1984), *aff'd in part, vacated in part*, 858 F.2d 160 (4th Cir.1988), *cert. denied*, 490 U.S. 1106, 109 S.Ct. 3156, 104 L.Ed.2d 1019 (1989) (lessees); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir.1985) (corporate officers and shareholders).

[9] In *Joslyn Manufacturing Co. v. T.L. James & Co., Inc.*, 893 F.2d 80, 83 (5th Cir.1990), *cert. denied*, — U.S. ——, 111 S.Ct. 1017, 112 L.Ed.2d 1098 (1991), the Fifth Circuit held that a parent corporation only may be held liable under CERCLA under veil-piercing principles when the corporate form has been used as a sham. To the extent that *Joslyn* appears to hold that actual ownership is necessary for liability to attach under section 107(a)(2), the court disregards the case as contrary to the statute's plain language and purpose.

CERCLA provides little guidance. By defining "owner or operator" circuitously, the statute fails to make explicit the what kind of "operator" it is intended to reach. As a result, different tests for liability have been developed by the courts. *Compare Kayser-Roth*, 910 F.2d at 27 (holding that to find parent corporations liable under CERCLA "at a minimum . . . requires active involvement in the activities of the subsidiary"); *Mobay*, 761 F.Supp. at 353-54 (holding parent corporations may be liable if they participated in the management or exercised control over a corporate entity) *with Bunker Hill*, 635 F.Supp. at 672 (holding liability turns on three-part test based on whether the parent corporation had the capacity to control or prevent release of hazardous material); *Kelley v. Arco Indus. Corp.*, 723 F.Supp. 1214, 1220 (W.D.Mich.1989) (adopting a test of whether a corporate individual "could have prevented or significantly abated the release of hazardous substances").

After visiting this issue over several months through exhaustive briefing for summary judgment and trial, I have concluded that CERCLA broadens the potential for liability of parent corporations without discarding entirely the traditional concept of limited liability that is central to corporate law. By expressly including as liable parties those that have "operated" facilities, Congress unmistakably expanded the reach of CERCLA beyond the limited realm of those who have "owned" sites. But the statute and its legislative history do not suggest that CERCLA rejects entirely the crucial limits to liability that are inherent to corporate law.

Accordingly, it seems that CERCLA's "owned or operated" language forges a new, middle ground. It is a ground that at once accommodates the general principle of limited liability and the broader principle of liability attaching for operative activity. To permit these principles to coexist under CERCLA, the liability of a parent corporation cannot attach simply because a parent has had involvement with its subsidiary in a manner merely consistent with their investment relationship. Rather, a parent must have actually operated the business of its subsidiary.

In this court's view, then, a parent corporation is directly liable under section 107(a)(2) as an operator only when it has exerted power or influence over its subsidiary by actively participating in and exercising control over the subsidiary's business during a period of disposal of hazardous waste. A parent's actual participation in and control over a subsidiary's functions and decision-making creates "operator" liability under CERCLA; a parent's mere oversight of a subsidiary's business in a manner appropriate and consistent with the investment relationship between a parent and its wholly owned subsidiary does not.

Factors to consider in assessing whether a parent corporation operated its subsidiary include the parent's participation in the subsidiary's board of directors, management, day-to-day operations, and specific policy matters, including areas such as manufacturing, finances, personnel and waste disposal. In addition, determining the origin and business function of the subsidiary in the context of the parent corporation's business may be helpful in determining whether the parent has operated a wholly owned subsidiary. Other evidence may be less probative if it

is simply indicative of the actions of a prudent investor, rather than an active operator, including monitoring of a subsidiary's financial performance, consolidation of corporate business matters such as accounting and legal work, and cooperation between the subsidiary and the parent in research. In the final analysis, each case must be decided on its own unique facts and circumstances.

In arriving at this standard for direct CERCLA liability of parent corporations, the court joins a majority of courts that have similarly concluded that CERCLA requires significant control and active participation by a parent corporation for liability to attach. *See, e.g., Kayser Roth*, 910 F.2d at 27; *Mobay*, 761 F.Supp. at 354; *Rockwell Int'l Corp. v. IU Int'l Corp.*, 702 F.Supp. 1384, 1390 (N.D.Ill.1988); *Colorado v. Idarado Mining Co.*, 1987 WL 56460, 1987 U.S.Dist.Lexis 14254 (D.Colo.1987); *New York v. Exxon Corp.*, 112 B.R. 540, 547 (S.D.N.Y.1990).

The second basis for CERCLA liability of parent corporations is indirect or vicarious liability through the traditional common-law theory of veil-piercing. When a subsidiary itself is liable under CERCLA, a parent corporation may be held liable under circumstances that make it appropriate to disregard their separate corporate existence. In the Sixth Circuit, when applying a common law principle such as the vicarious liability of parent corporations to the question of CERCLA liability, state law controls. *Anspec Co., Inc. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1248 (6th Cir.1991).

Under Michigan law, piercing the corporate veil to reach a parent corporation or other investor is an equitable doctrine that is applied to prevent fraud,

illegality or injustice. *See Schusterman v. Employment Security Comm.*, 336 Mich. 246, 57 N.W.2d 869 (1953); *Soloman v. Western Hills Dev. Co.*, 110 Mich. App. 257, 312 N.W.2d 428, 431 (1981). Separate corporate existence is disregarded only in limited circumstances, and each case considering whether to disregard the corporate entity turns on its own unique factual circumstances. *Lettinga v. Agristor Credit Corp.*, 686 F.2d 442, 446 (6th Cir.1982); *Ann Arbor v. University Cellar, Inc.*, 401 Mich. 279, 258 N.W.2d 1 (1977); *Brown Bros. Equip. Co. v. State*, 51 Mich. App. 448, 215 N.W.2d 591 (1974).

A Michigan court may generally pierce the veil of a parent corporation after finding that the subsidiary has been a mere instrumentality of the parent, that the separateness between the corporations has been used to commit fraud or wrong, and that unjust loss or injury to the plaintiff has occurred. *Bodenhamer Bldg. Corp. v. Architectural Research Corp.*, 873 F.2d 109, 112 (6th Cir. 1989); *Maki v. Copper Range Co.*, 121 Mich. App. 518, 328 N.W.2d 430 (1982).

It also may be appropriate under some circumstances to pierce the veil of a separate corporate entity to serve the interests of justice when an individual is the sole shareholder of a corporation, as in the case of a parent corporation and its wholly owned subsidiary. *See Lettinga*, 686 F.2d at 446; *Pettaway v. McConaghy*, 367 Mich. 651, 116 N.W.2d 789, 790 (1962); *Montgomery v. Central Nat'l Bank & Trust Co.*, 267 Mich. 142, 255 N.W. 274, 276 (1934). For example, the fiction of the corporate form may be disregarded when a complete identity of interests exists between two corporate individuals so as to suggest that one was simply the alter ego of the

other. *See Pettaway*, 116 N.W.2d at 790; *Williams v. American Title Ins. Co.*, 83 Mich. App. 686, 269 N.W.2d 481, 486 (1978); *Montgomery*, 255 N.W. at 276.

b. Liability of CPC under section 107(a)(2)

To determine first whether CPC is directly liable under section 107(a)(2), the court has engaged in a highly fact-specific inquiry into the history of CPC's involvement with Ott II. In assessing CPC's level of participation and control in Ott II's activities, the court has evaluated various aspects of Ott II's business and its parent-subsidiary relationship, including: the role and composition of Ott II's board of directors; the role and composition of Ott II's management; the conduct of high-ranking CPC officials with respect to Ott II; the supervision of Ott II by CPC's development company; CPC's budgetary and capital expenditure restraints on Ott II; and CPC's involvement in specific Ott II policy matters, including waste disposal and labor problems.

After considering these and all the facts regarding CPC's involvement with Ott II, the court holds that CPC is directly liable under section 107(a)(2) as an operator because CPC actively participated in and exerted significant control over Ott II's business and decision-making. CPC's history of involvement in Ott II through its board, management, the CPC development company, and specific policy matters including hazardous waste disposal, demonstrates the high level of participation required for direct liability to attach to CPC under section 107(a)(2).

The court has considered the following facts particularly probative: 1) CPC's 100-percent ownership of

Ott II; 2) CPC's active participation in, and at times majority control over, Ott II's board of directors, which was an active decision-making body chaired by a CPC official throughout the Ott II era; 3) CPC's involvement in major decision-making and day-to-day operations through CPC officials who served within Ott II management, including the positions of president and chief executive officer; 4) the conduct of CPC officials with respect to Ott II affairs, particularly Arnold Ott, James Eiszner and Beverly Warner; 5) the function of the CPC development company as another source of policy-making for Ott II; 6) the active participation of and control by CPC officials in Ott II environmental matters, particularly through CPC's environmental director G.R.D. Williams who helped formulate Ott II policies, participated in regulatory meetings and issued directives regarding Ott II's responses to regulatory inquiries; 7) the active participation of CPC officials in Ott II labor problems; and 8) the financial control exerted by CPC through its approval of Ott II's budgets and major capital expenditures.

Liability attaches here because the evidence shows active participation and control by CPC in Ott II affairs both internally through the subsidiary's board and management and externally through the policies of the development company and the actions of individual CPC officials. The evidence shows a level of participation and control by CPC that exceeds the bounds of an interested investor and enters the realm of an active operator. When a parent corporation permeates the board, management and decision-making of a wholly owned subsidiary that was

disposing of hazardous waste, operator liability directly attaches under CERCLA.

Based on all of these facts, the court holds CPC directly liable under section 107(a)(2) as an owner or operator during a period of disposal of hazardous waste.

Because the court has concluded that CPC is directly liable under CERCLA's section 107(a)(2), it need not reach the question of whether CPC should be held liable under CERCLA through common-law veil-piercing, which is an alternative theory of liability.

Similarly, CPC's direct CERCLA liability makes it unnecessary to reach at this juncture the parties' claim of CPC liability arising from Ott II allegedly have been a successor corporation to Ott I.

A successor corporation may be a liable person under CERCLA. *Anspec*, 922 F.2d at 1247-48. Successor liability is a theory that may be applied under limited circumstances to reach parties that otherwise might escape responsibility for cleanup costs. *See, e.g., Smith Land & Improv. Corp. v. Celotex Corp.*, 851 F.2d 86 (3d Cir.1988), *cert. denied*, 488 U.S. 1029, 109 S.Ct. 837, 102 L.Ed.2d 969 (1989); *Kelley v. Thomas Solvent Co.*, 725 F.Supp. 1446, 1457-59 (W.D.Mich.1988); *United States v. Vertac Chem. Corp.*, 671 F.Supp. 595, 614-19 (E.D.Ark.1987). In this case, however, CPC's direct liability for the cleanup costs at the site eliminates the necessity of determining the successorship question for liability purposes; based on its direct liability under section 107(a)(2), CPC is jointly and severally liable for cleanup costs at the site.

Nevertheless, the question of successor liability—namely, whether CPC may be held liable for the hazardous waste disposal of the Ott I era under Michigan successor liability and veil-piercing principles—could have some relevance to the court's future determination on the issue of apportionment. A responsible party's degree of involvement in the disposal of hazardous waste, the amount of hazardous waste involved and the degree of care exercised by the parties are some of the factors that a trial court may consider in determining the parties' proportionate shares in a contribution action. *United States v. R.W. Meyer, Inc.*, 932 F.2d 568 (6th Cir. 1991). As a result, the court defers any conclusions with respect to successorship until it reaches allocation issues at the conclusion of the remedy phase of this case.[10]

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[10] During trial, the court denied CPC's motion to exclude evidence regarding successor liability. Trial tr. at 2458-60. The court based its decision in part on the pretrial order that expressly set forth as an unresolved issue "whether Ott-II is the corporate successor to Ott-I" and facts relevant to the successor question. *Id.* After trial, CPC filed a motion to strike proposed findings of fact and conclusions of law filed by the United States and MDNR that asserted CPC, not Ott II, is the corporate successor to Ott I. CPC argues that it had no notice of this alternative theory of liability. As noted above, the court has not reached successorship issues in concluding that CPC is liable under CERCLA section 107(a)(2). Therefore, CPC's motion is moot with respect to liability. Parties participating in the remedy phase of the trial may, with leave of the court, file additional findings of fact and conclusions of law on the successor corporation issue that may be relevant to the court's allocation decision. Accordingly, CPC's motion is denied without prejudice.

C. Conclusions of law regarding MDNR liability

1. Claims against MDNR

CPC and the Cordova defendants claim that MDNR should be held liable under CERCLA for its activities at the site. CPC alleges that MDNR, Aerojet and Cordova/California are liable under section 107(a)(3) as arrangers of disposal arising from the October 1977 stipulation and consent order entered into by MDNR and Cordova/California. CPC, Aerojet, Cordova/California and Cordova/Michigan also allege that MDNR is liable under section 107(a)(2) as an operator due to its cleanup efforts at the site.

2. Section 107(a)(3) "arranger" liability

As the court has previously discussed, CPC's section 107(a)(3) claim, though novel, is tenable under the broadly remedial provisions of CERCLA. *CPC Int'l Inc. v. Aerojet-General Corp.*, 759 F.Supp. 1269, 1277-81 (W.D.Mich.1991); *CPC Int'l Inc. v. Aerojet-General Corp.*, 731 F.Supp. 783, 789-90 (W.D. Mich. 1989).

CPC has alleged that MDNR agreed at the time of Cordova/California's acquisition of the site, to remedy the groundwater contamination problem through resumed operation of purge wells. Because the purge wells were not operated and the groundwater contamination continued to spread, CPC claims, MDNR, Aerojet and Cordova/California should all be held liable for an arrangement for disposal of contaminated groundwater that actually worsened the problem.

In opinions ruling on pretrial motions, the court has recognized that the unchecked spread of groundwater contamination qualifies as disposal under CERCLA's statutory definition of the term. 42 U.S.C. § 9601(29) (adopting 42 U.S.C. § 6903(3)); *CPC*, 759 F.Supp. at 1278; *CPC*, 731 F.Supp. at 789. In addition, the court has noted that, if proved, CPC's allegations would make a case for CERCLA liability that is consistent with the statute's goal of placing the burden of cleanup on the parties responsible for creating or worsening an environmental problem. *CPC*, 759 F. Supp. at 1279-80. *See also United States v. Waste Indus. Inc.*, 734 F.2d 159, 164 (4th Cir. 1984); *Emhart Indus., Inc. v. Duracell Int'l, Inc.*, 665 F.Supp. 549, 574 (M.D. Tenn. 1987); *United States v. Price*, 523 F.Supp. 1055 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir.1982).

Several factual disputes precluded summary judgment on CPC's arranger claim. *CPC*, 759 F.Supp. at 1278-81. The central question in dispute was whether an agreement actually existed between MDNR and Cordova/California for MDNR to remedy the groundwater contamination problem.

After hearing all the testimony and evidence, the court has found that no agreement existed among the parties with respect to the groundwater contamination problem. Instead, the fate of the contaminated groundwater was left unresolved by the parties. After MDNR and Cordova/California reached an agreement regarding other cleanup responsibilities at the site, MDNR attempted to address the groundwater problem as part of its ongoing regulatory activity over the severe environmental problems at the site. As a result, MDNR requested and obtained a

$170,000 appropriation for a new groundwater purging system.

Because no arrangement was made between MDNR and Cordova/California with respect to the groundwater contamination, MDNR, Aerojet and Cordova/California are not liable under section 107(a)(3) as arrangers for disposal.

Other facts also preclude imposition of liability against MDNR under section 107(a)(3). As the court has previously noted, for liability to attach to a party without actual ownership or possession of a facility, a nexus must exist in which a party has assumed responsibility for or control over the disposition of hazardous waste. *CPC*, 759 F.Supp. at 1278; *CPC*, 731 F.Supp. at 789-90. *See also United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 743 (8th Cir. 1986), *cert. denied*, 484 U.S. 848, 108 S.Ct. 146, 98 L.Ed.2d 102 (1987); *Stilloe v. Almy Bros., Inc.*, 759 F.Supp. 95, 103-04 (N.D.N.Y. 1991); *United States v. Mottolo*, 629 F.Supp. 56, 60 (D.N.H. 1984).

In this case, a nexus of control or possession is lacking in the case against MDNR because MDNR's involvement in cleanup activities at the site was only regulatory. MDNR merely worked to eliminate or reduce severe environmental problems that had been left by prior owners and threatened public health and the environment. While dicta in the court's opinions on pretrial motions recognized the possibility of a sufficient nexus between MDNR and the site, MDNR proved at trial that a nexus of ownership or control between MDNR and the site did not exist.

Even if a prima facie section 107(a)(3) case against MDNR had been made, MDNR would not be liable because its actions at the site were taken in response to an environmental emergency. Section 107(d)(2) states, in relevant part:

> No State . . . shall be liable under this title for costs or damages as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person. This paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or local government. For the purpose of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence.

42 U.S.C. § 9607(d)(2).

MDNR's regulatory activities at the site were initiated in response to an environmental emergency posed by dire environmental conditions that were created by prior owners and that threatened to worsen. Further, the state's response was devoid of the misconduct or gross negligence that would strip MDNR of its immunity under section 107(d)(2). Instead, the agency's cleanup efforts, though only a partial remedy for the problems, were a good-faith attempt to eliminate or control an environmental disaster at a time when the agency's tools were severely limited. The court concludes that section 107(d)(2) immunizes MDNR from any liability under section 107(a) because the state's activities at the site were an appropriate response to an environmental emergency.

3. Section 107(a)(2) "operator" liability

As the court has detailed above, "operator" liability must be interpreted broadly in accordance with the language and intent of CERCLA. A state may thus be held liable as an operator in limited circumstances when it permits hazardous waste disposal to occur at a site over which it exercises dominion or control. *See Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989); *CPC*, 731 F.Supp. at 787-89; *United States v. Stringfellow*, 31 Envtl.L. Rep. 1315 (C.D.1990); *Hassayampa Steering Comm. v. Arizona*, 21 Chem. Waste Lit.Rptr (BNA) 322 (D. Ariz.1990); CPC, 731 F.Supp. at 787-88. However, CERCLA liability does not arise when a state agency merely engages in regulatory activity at a site. *See United States v. Dart Indus. Inc.*, 847 F.2d 144, 146 (4th Cir. 1988); *United States v. Azrael*, 765 F.Supp. 1239 (D. Md. 1991); *CPC*, 731 F.Supp. at 788.

In this case, MDNR's regulatory response to severe environmental problems left by others does not constitute the possession or control necessary for a state to become an operator. Because MDNR's actions were regulatory and the agency did not assume possession or control over the site or its problems, the court concludes that MDNR cannot be held liable as an operator under section 107(a)(2).

Furthermore, as set forth above, section 107(d)(2) immunizes MDNR from any CERCLA liability because its efforts at the site were a response to an environmental emergency and its actions cannot be characterized as gross negligence or intentional misconduct. *See supra*, pp. 577-78.

For the reasons stated, MDNR is not liable as an operator under section 107(a)(2).

D. Conclusions of law regarding liability of Aerojet, Cordova/California, Cordova/Michigan

1. Claims against Aerojet and its subsidiaries

The United States, MDNR and CPC have advanced a variety of claims against Aerojet and its wholly owned subsidiaries, Cordova/California and Cordova/Michigan. The United States, MDNR and CPC allege that Cordova/Michigan and Aerojet are liable under section 107(a)(1) as the present owner and operator of the site. They further allege that Aerojet, Cordova/California and Cordova/Michigan are liable under section 107(a)(2) for having owned or operated the site during a period of disposal. CPC also alleges that Aerojet and Cordova/California may be held liable under section 107(a)(3) for the alleged arrangement with MDNR for removal of contaminated groundwater.

2. Section 107(a)(1) "present owner" liability

Section 107(a)(1) holds the "present owner and operator of a . . . facility" liable. Because it is undisputed that Cordova/Michigan has held legal title to the site since 1978, direct CERCLA liability clearly attaches to Cordova/Michigan under section 107(a)(1).

Aerojet's liability under section 107(a)(1) as a present owner turns on the question of whether piercing the corporate veil is appropriate. Aerojet cannot be held directly liable under section 107(a)(1) merely because its wholly owned subsidiary is the actual owner and operator of the facility. But as with section 107(a)(2) "owner or operator" liability, a parent corporation may be held liable as a "present owner and operator" if the circumstances justify disregarding the corporate form and attaching vicarious liability.

As noted above, the Sixth Circuit recently established that state law controls questions of when CERCLA liability should attach to parent corporations under common law theories and principles. *Anspec*, 922 F.2d at 1248. In this case, then, Michigan's veil-piercing standards apply. Under Michigan law, the court therefore must engage in a searching inquiry into all the unique facts and circumstances of the parent-subsidiary relationship at issue to determine whether their separate corporate existences should be disregarded. *See supra*, at p. 574.

After considering all the evidence as well as controlling Michigan law on veil-piercing, the court concludes that this is an appropriate case to disregard the corporate form to serve the interests of justice. *See Lettinga*, 686 F.2d at 446; *Pettaway*, 116 N.W.2d at 790; *Montgomery*, 255 N.W. at 276.

Aerojet totally dominated Cordova/Michigan, creating a complete identity of interests between the parent and its wholly owned subsidiary. In both its corporate structure and function, Cordova/Michigan was a mere instrumentality of Aerojet, lacking any

structural or actual independence in the operation of its business. The creation of Cordova/Michigan as a separate subsidiary only served as an attempt to shield Aerojet from liabilities associated with the companies' integrated business at a facility where pollution problems were known to exist. Permitting Aerojet to escape CERCLA liability as the present owner and operator here would create an injustice to the parties who are entitled to recover their cleanup costs from the present owner and operator of a contaminated site. It would also do injustice to CERCLA itself, which aims to make parties that have actually owned or operated hazardous waste sites pay for their cleanup.

For these reasons, the court concludes that Aerojet is liable under section 107(a)(1) because, under Michigan's well-settled standards, veil-piercing is appropriate. *See Bodenhamer Bldg. Corp.*, 873 F.2d at 112; *Lettinga*, 686 F.2d at 446; *Pettaway*, 116 N.W.2d at 790; *Montgomery*, 255 N.W. at 276.

In reaching this conclusion, the court has considered the following facts to be particularly probative: 1) Aerojet was 100-percent shareholder of Cordova/California, which in turn wholly owned Cordova/Michigan; 2) Aerojet itself led the acquisition of the site, only incorporating its Cordova division after it became apparent that the site would be purchased, about 10 days before the signing of the stipulation and consent order; 3) the timing of the incorporation of Cordova subsidiaries reflected Aerojet's singular goal of insulating itself from liability; 4) the purpose of acquiring the site was to manufacture a product essential to Aerojet's Cordova division that would no longer be available from outside sources; 5)

when manufacturing operations commenced at the site, Cordova/Michigan was part of an integrated business operation in which Cordova/Michigan supplied EI for use in manufacturing by Cordova/California; 6) the incorporation of Cordova/Michigan and Cordova/California were changes in form, not in substance, as former officers in Aerojet's Cordova division retained identical or similar jobs with the new subsidiaries; 7) Aerojet dominated the corporate hierarchy of both Cordova/Michigan and Cordova/California, where at least 20 Aerojet officials have held positions nearly identical to those they have held simultaneously with the parent company; 8) Cordova/Michigan and Cordova/California officials reported directly to Aerojet officials, who held authority to give directions on day-to-day operations and policy matters; 9) the board of directors of Cordova/Michigan and Cordova/Michigan were non-functional and did not even convene in meetings; 10) Aerojet possessed total financial control over Cordova/Michigan and Cordova/California, which lacked of authority to maintain separate bank accounts; and 11) Aerojet arranged the assignment to Cordova/California of $25 million in worthless debt owed to it by Cordova/Michigan, which effectively eliminated $13 million owed by Aerojet to Cordova/California.

For the reasons stated, the court holds Cordova/Michigan and Aerojet liable under section 107(a)(1) as the present owner of the site.

3. Section 107(a)(2) "operator" liability

Because disposal of hazardous substances occurred at the site during the Cordova era[11], the liability of Cordova/California and Aerojet turns on whether the companies have "owned or operated" the facility, as with the court's determination of CPC's liability.

Cordova/California actually owned the site until it transferred the property to its newly created subsidiary, Cordova/Michigan, in November 1978. During this period, Cordova/California engaged in construction activities to prepare the facility for its chemical manufacturing operations, and the company engaged in the cleanup activities set forth in the stipulation and consent order signed with MDNR. Because Cordova/California owned the site from October 1977 to November 1978 during which hazardous waste disposal occurred, the court holds Cordova/California liable under section 107(a)(2).

Aerojet's liability under section 107(a)(2) must be determined under the same framework used in CPC's case, in which direct liability under the statute's "operator" language and vicarious liability through common law veil-piercing provide alternative theories

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[11] As the court has noted above and in its previous opinions, disposal of hazardous substances at the site occurred after 1977, as contaminants continued to spread into the ground and water and were carried off-site by the flow of groundwater. *See*, *supra*, p. 576; *CPC*, 759 F.Supp. at 1278; *CPC*, 731 F.Supp. at 789. In addition, hazardous substances used at the site during the Cordova period of ownership has been found in the contamination at the site, indicating that additional disposal occurred.

for holding a parent corporation liable. *See supra*, pp. 571-74.

In assessing Aerojet's direct liability as an operator at the site, the court must once again engage in a comprehensive inquiry into Aerojet's relationship with its subsidiaries and involvement with the site during the Cordova era. The court must determine whether the evidence has shown that Aerojet exerted power or influence by actively participating in and exercising control over the subsidiaries' business during a period of disposal of hazardous waste.

In light of the same facts that were probative in concluding Aerojet is liable under section 107(a)(1), the court concludes that Aerojet operated the site through active participation and pervasive control over the businesses of both Cordova/California and Cordova/Michigan.

As with CPC's involvement with Ott II, Aerojet's participation and control over the board, management and decision-making at Cordova/California and Cordova/Michigan shows that the parent operated the facility. Aerojet's conduct toward its subsidiaries extended well beyond the activities that are merely indicative of a parent's general oversight of a wholly owned subsidiary.

Accordingly, the court concludes the Aerojet is directly liable as an operator under section 107(a)(2).

Aerojet's direct liability under section 107(a)(2) makes it unnecessary to pierce the corporate veil under this provision, although the court has already concluded that disregarding the corporate form is

appropriate in Aerojet's case for liability under section 107(a)(1). *See supra*, pp. 578-79.

For the reasons set forth above, Cordova/California and Aerojet are liable under section 107(a)(2).

4. Section 107(a)(3) "arranger" liability

As the court addressed above in concluding that MDNR could not be held liable as an arranger, no agreement existed between MDNR and either Aerojet or Cordova/California with respect to a remedy for the groundwater contamination that existed at the site at the time of the signing of the stipulation and consent order. *See, supra* at pp. 576-77.

Accordingly, the court concludes that Aerojet and Cordova/California are not liable under section 107(a)(3) for arranging for the disposal of hazardous waste.

5. Section 107(b)(3) innocent landowner defense

Aerojet, Cordova/California and Cordova/Michigan contend that any liability findings against them are precluded by section 107(b)(3). The section provides a limited defense to CERCLA's strict liability to those parties who are innocent purchasers. The provision states, in relevant part:

> There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

. . . .

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substances, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; . . .

42 U.S.C. § 9607(b)(3). The statute further defines "contractual relationship," whose existence can prevent use of the innocent purchaser defense, to include, without limitation:

> land contracts, deeds or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:
>
> > (i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance

> which is the subject of the release or threatened release was disposed of on, in, or at the facility.

. . . . .

42 U.S.C. § 9601(35)(A).

To summarize, section 107(b)(3) provides a defense to liability in this case if a defendant shows that: 1) the hazardous contamination at the site was caused solely by other parties; 2) no direct or indirect contractual relationship existed between it and the parties responsible for contaminating the site; 3) it did not know or have reason to know of the contamination at the site at the time of purchase; and 4) it exercised due care with respect to the hazardous waste at the site.

Failure to prove any of these elements by a preponderance of the evidence precludes use of the innocent landowner defense. Aerojet, Cordova/California and Cordova/Michigan so fail. By acquiring the site from Story's bankruptcy trustee, Cordova/California had an indirect contractual relationship with a party responsible for contaminating the site. *See In re Sterling Steel Treating, Inc.*, 94 B.R. 924 (Bkrtcy.E.D.Mich.1989). In addition, Aerojet and Cordova/California clearly knew about contamination at the site; in fact, Aerojet's obligations for cleanup were central to the negotiations over acquisition of the site. Aerojet and its subsidiaries also have failed to prove that the contamination was caused solely by others and that they exercised due care at the site. A hazardous substance used by Cordova/Michigan in its manufacturing process is among those in the contamination at the site. In addition, the con-

tamination created by prior owners has spread unabated off site, worsening the contamination problem, due at least in the part to the continued inoperation of purge wells. These facts make the defense of section 107(b)(3) inapplicable to the liability of Aerojet, Cordova/California and Cordova/Michigan.

For these reasons, the court holds that section 107(b)(3) does not preclude the imposition of liability against Cordova/Michigan, Cordova/California and Aerojet.

IV. CONCLUSION

Based on the findings of facts and conclusions of law set forth above, the court holds that CPC, Aerojet, Cordova/California and Cordova/Michigan are liable under CERCLA's section 107(a) for cleanup costs at the site, and that MDNR is not liable.

CPC is liable for claims brought under section 107(a)(2) as an operator of the site during a period of disposal.

MDNR is not liable for claims brought under section 107(a)(2) as an operator of the site during disposal or under section 107(a)(3) as an arranger for disposal of hazardous waste.

Aerojet is liable for claims brought under section 107(a)(1) as the present owner and operator of the site and under section 107(a)(2) as an operator of the site during disposal. Cordova/California is liable under section 107(a)(2) as an operator of the site during

disposal. Cordova/Michigan is liable under section 107(a)(1) as the present owner and operator of the site and under section 107(a)(2) as an owner or operator during a period of disposal. Aerojet and Cordova/California are not liable under section 107(a)(3) as arrangers of disposal of hazardous waste.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 92-2288, 92-2326

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

CORDOVA CHEMICAL COMPANY OF MICHIGAN; CORDOVA CHEMICAL COMPANY; AEROJET-GENERAL CORPORATION, DEFENDANTS-APPELLANTS (92-2288), DEFENDANTS-APPELLEES

CPC INTERNATIONAL INC., DEFENDANT-APPELLEE, DEFENDANT-APPELLANT (92-2326)

ARNOLD C. OTT; COMMERCIAL UNION INSURANCE COMPANY, ET AL., DEFENDANTS

MICHIGAN DEPARTMENT OF NATURAL RESOURCES, DEFENDANT-APPELLEE

[Argued March 25, 1994]

[Decided: July 14, 1995]

Before: CELEBREZZE, RYAN, and NORRIS, Circuit Judges.

NORRIS, J., delivered the opinion of the court, in which CELEBREZZE, J., joined. RYAN, J. (pp. [150a-170a], delivered a separate dissenting opinion.

ALAN E. NORRIS, Circuit Judge.

This appeal highlights the difficulty that often attends the apportionment of liability for clean-up costs of sites that have been subjected to long-term environmental degradation. In the present case, brought pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9674 (1988 & Supp. V 1993), the environmental damage occurred over a period of decades and during the watch of several owners.

A central concern on appeal is the criteria required under CERCLA before a parent corporation can be held financially liable for pollution that occurred during the ownership of a subsidiary. Because we adopt a stricter standard than did the district court for imposition of such liability, we reverse certain of its determinations and remand for further proceedings.

I. PROCEEDINGS BELOW

In May and June 1991, the district court conducted a fifteen-day bench trial to determine which parties were responsible for clean-up costs related to pollution of a site located in Dalton Township, Michigan. In addition to the live testimony of twenty-nine witnesses, the court received more than 2,300 exhibits and reviewed dozens of deposition transcripts. Given the complexity of the proceedings below, the factual findings contained in the district court's published opinion are extensive. *CPC Int'l, Inc. v. Aerojet-General Corp.*, 777 F.Supp. 549, 555-70 (W.D.

Mich. 1991). We summarize them here by way of background.

Beginning in 1957, a series of owners used the Dalton Township site to manufacture chemicals. The initial owner, the Ott Chemical Company ("Ott I"), controlled the site from 1957 until 1965. During this time, the groundwater flowing underneath the site became contaminated, a development confirmed by tests conducted in 1964.

Pollution of soil, surface water, and groundwater continued after the Ott Chemical Company ("Ott II"), a wholly owned subsidiary of CPC International, Inc. ("CPC"), took over ownership of the site in 1965. The use of unlined lagoons as a means of chemical waste disposal was the principal cause of the contamination. According to the district court, this practice spanned the period from 1959 until at least 1968.

See page from these lagoons did not, however, constitute the sole source of pollution that occurred during the ownership of Ott I and Ott II. Further contamination emanated from chemical spills from train cars, from chemical drums, from overflows of chemicals contained in a cement-lined equalization basin, and from other sources. Groundwater pollution did not go completely untreated during this time; from 1965 until 1974, purge wells were operated intermittently in an attempt to alleviate the problem.

In 1972, the Story Chemical Company ("Story") acquired the site from Ott II and continued to operate it until 1977, when bankruptcy ended operations. At that point, a trustee in bankruptcy assumed title to the site and attempted to find a buyer.

Active governmental response to the pollution problems at the site began in 1977, after Story's bankruptcy, when the Michigan Department of Natural Resources ("MDNR") visited the site to assess the situation. In view of the severity of the environmental problems and the lack of resources to pay for a cleanup, the MDNR became active in efforts to attract a purchaser who would participate financially in clean-up efforts. This search led to the signing of a document on October 13, 1977, by the Cordova Chemical Company ("Cordova/California"), a wholly owned subsidiary of Aerojet-General Corporation ("Aerojet"), and the MDNR. The district court described the agreement and its aftermath:

> It addressed the problem of environmental contamination at the property and set forth obligations with respect to cleanup activities. . . .
>
> . . . .
>
> . . . MDNR agreed to remedy the waste container and sludge problems, and Cordova/California agreed to eliminate the phosgene gas and give MDNR $600,000 to defray the costs of the agency's cleanup of the waste containers, sludge and residential wells.
>
> . . . .
>
> With respect to Cordova/California's $600,000 payment and the company's responsibility or liability for the contamination at the site it was acquiring, the [agreement] stated:

. . . .

> Cordova Chemical Company shall not have any responsibility or liability in connection with any other corrective actions which the Department of Natural Resources or any other governmental agency may hereafter deem necessary. . . .

. . . .

However, the agreement did not provide for a total cleanup of the site's severe environmental problems. . . .

In particular, MDNR and Cordova/California did not reach an agreement regarding a remedy for the groundwater contamination problem. Instead, the fate of the groundwater problems was not resolved, with MDNR left to tackle the problem as part of its overall regulatory responsibility for the site.

. . . .

> . . . Cordova/California and MDNR fulfilled their cleanup obligations under the [agreement]

. . . .

CPC Int'l v. Aerojet-General, 777 F.Supp. at 564-67.

Having executed this document, Cordova/California purchased the site the following day from the Story bankruptcy trustee. Cordova Chemical Company of Michigan ("Cordova/Michigan"), a wholly owned subsidiary of Cordova/California, acquired ownership of the site in 1978. Cordova/Michigan retains ownership, although manufacturing operations at the site ceased in 1986.

The district court made the following observations regarding conditions at the site during the ownership of the Cordova companies:

> During their period of operations, [the companies] neither buried waste nor dumped it onto the ground. No chemical waste was disposed into the unlined lagoons that had been used during the Ott I and Ott II eras. Before beginning chemical manufacturing, Cordova/Michigan repaired the equalization basin and chemical sewer system. When operating, Cordova/Michigan discharged chemical waste through off-site disposal or to a sewer that flowed to the Muskegon County treatment facility.

Id. at 556. In short, although the preexisting groundwater contamination problem was not remedied during their ownership, the trial court concluded that neither Cordova/California nor Cordova/Michigan exacerbated the condition.[1]

The federal Environmental Protection Agency became involved in cleanup of the site in 1981. Since

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[1] The district court noted that two hazardous chemicals—benzene and 1,2 dichloroethane—were found at the site and used during the Cordova period of ownership. *Id.* at 556, 579 n. 11. Although Cordova/Michigan, in an April 5, 1984, letter to the federal EPA, acknowledges generating small quantities of these materials for disposal, we find nothing in the record to support a finding that any additional release of hazardous substances occurred at the site during the Cordova period.

then, the EPA has formulated a long-term response to the environmental damage that has occurred at the site; the cost of this effort will run into the millions of dollars.

II. CERCLA LIABILITY

Section 107(a) of CERCLA lists the parties who are potentially liable for the clean-up costs of a polluted site.[2] 42 U.S.C. § 9607(a). For the purposes of this action, those parties include the present owner *and* operator of a facility from which there is a release of a hazardous substance, any prior owner or operator of a facility whose involvement coincided with disposal of a hazardous substance, and any person who arranged

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[2] 42 U.S.C. § 9607(a) states, in part:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
>
> (1) the owner and operator of a . . . facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment of hazardous substances . . .
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, . . . from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—
>
> (A) all costs of removal or remedial action. . . .

for the disposal or transport of hazardous waste from a facility. 42 U.S.C. § 9607(a)(1)-(3). The parties stipulated that the site is a "facility" as defined by CERCLA, that it contains "hazardous substances," that "releases" of hazardous substances have occurred and threaten to continue, and that CPC, the MDNR, Aerojet, Cordova/California, and Cordova/Michigan are "persons" as defined by the statute. *Id.* at 556.

Because courts that have been asked to render liability decisions in CERCLA actions frequently invoke the remedial purpose of the act, *e.g.*, *United States v. Kayser-Roth Corp., Inc.*, 910 F.2d 24, 26 (1st Cir.1990), *cert. denied*, 498 U.S. 1084, 111 S.Ct. 957, 112 L.Ed.2d 1045 (1991), we will review that subject before considering the liability of those parties now before us.

Congress did enact CERCLA as a "remedial statute designed to protect and preserve public health and the environment." *Kayser-Roth*, 910 F.2d at 26; *accord Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221 (3d Cir.1993); *Anspec Co., Inc. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1241-42 (6th Cir.1991) (reviewing this circuit's approach to CERCLA liability). Accordingly, courts generally will not interpret § 9607(a) in a way that apparently frustrates the statute's goals in the absence of specific congressional intent otherwise. *Anspec*, 922 F.2d at 1247 (citing *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1045 (2d Cir.1985)).

It must be recognized, however, that it is difficult to divine the specific, as opposed to the general, goals of Congress with respect to CERCLA liability since the statute represents an eleventh hour compromise.

See generally Shore Realty Corp., 759 F.2d at 1039-42 (discussing legislative history). As the district court recognized, "some of CERCLA's provisions are vague and its legislative history sparse." *CPC Int'l v. Aerojet-General*, 777 F.Supp. at 571; *accord Anspec*, 922 F.2d at 1247 (characterizing the legislative history as "scant"); *Lansford-Coaldale Joint Water Auth.*, 4 F.3d at 1221 ("[C]ongressional intent may be particularly difficult to discern with precision in CERCLA, a statute notorious for its lack of clarity and poor draftsmanship.").

Courts would not be warranted, therefore, in pointing to the "remedial legislation" litany, *see generally* Norman J. Singer, 3 Sutherland Statutory Construction § 60.01 (5th ed. 1992) (the rule that remedial statutes should be liberally construed is "firmly established"); *Dennis v. Higgins*, 498 U.S. 439, 443, 111 S.Ct. 865, 868, 112 L.Ed.2d 969 (1991) (noting that 42 U.S.C. § 1983, as a remedial statue, should be liberally construed), as a means for filling in the blanks so as to discern a congressional intent to impose liability under nearly every conceivable scenario. Thus, while the liability provisions concerning facility operators should be construed so that financial responsibility for clean-up operations falls upon those entities who contributed to the environmental problem, the widest net possible ought not be cast in order to snare those who are either innocently or tangentially tied to the facility at issue. In fact, this court has said, "Congress intended that those responsible for disposal of chemical poisons bear the cost and responsibility for remedying the harmful conditions *they created*." *Anspec*, 922 F.2d at 1247 (emphasis added).

In turning to the specific facts now before us, we adhere to the tenet that liability attaches only to those parties who are culpable in the sense that they, by some realistic measure, helped to create the harmful conditions.

In its effort to discern the sweep of CERCLA liability, the district court concluded that:

> CERCLA broadens the potential for liability of parent corporations without discarding entirely the traditional concept of limited liability that is central to corporate law. . . .
>
> Accordingly, it seems that CERCLA's "owned or operated" language forges a *new, middle ground*. It is a ground that at once accommodates the general principle of limited liability and the broader principle of liability attaching for operative activity. To permit these principles to coexist under CERCLA, the liability of a parent corporation cannot attach simply because a parent has had involvement with its subsidiary in a manner merely consistent with their investment relationship. Rather, a parent must have actually operated the business of its subsidiary.

In this court's view, then, a parent corporation is directly liable under section 107(a)(2) as an operator only when it has exerted power or influence over its subsidiary by actively participating in and exercising control over the subsidiary's business during a period of disposal of hazardous waste. A parent's actual participation in and control over a subsidiary's functions and decision-making creates "operator" liability under CERCLA; a parent's mere oversight of a sub-

sidiary's business in a manner appropriate and consistent with the investment relationship between a parent and its wholly owned subsidiary does not.

CPC Int'l v. Aerojet-General, 777 F.Supp. at 573 (emphasis added).

On the basis of this "new, middle ground," the district court found both CPC and Aerojet liable as operators for the disposal of hazardous substances that occurred while their subsidiaries operated the site.

III. DISCUSSION

A. *CPC*

The district court reasoned that liability potentially could attach to CPC as a parent corporation in two ways: direct liability under CERCLA's "operator" language or by common law veil-piercing. It determined that CPC was liable as an operator of the site for environmental damage that occurred during the ownership of Ott II; this liability was grounded in section 107(a)(2) of CERCLA, which renders "any person [liable] who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of." 42 U.S.C. § 9607(a)(2). To reach this conclusion, the court had to find CPC, as a parent corporation, responsible for the conduct of its wholly owned subsidiary corporation, Ott II. Because the court held CPC directly liable as an operator, it did not reach the question of whether CPC was vicariously liable through the traditional common law theory of veil-piercing.

It is not at all clear from the district court's opinion whether the standard for finding parental liability under its "new, middle ground" is the actual operation of the subsidiary's business or, on the other hand, the exertion of power or influence through active participation in the subsidiary's business. Although they are used interchangeably in the district court's opinion, the two concepts are not interchangeable. In fact, the facts recited by the district court appear to support liability under the latter standard but not under the former. This confusion underscores the inevitable difficulty that arises when courts attempt to erect new concepts of corporate liability within the framework of CERCLA in the absence of direction from Congress. We are not persuaded that, in enacting CERCLA, Congress contemplated the abandonment of traditional concepts of limited liability associated with the corporate form in favor of a "new, middle ground."

CERCLA defines the "owner or operator" of an onshore facility as "any person owning or operating such facility." 42 U.S.C. § 9601(20)(A)(ii). When the facility has been conveyed to a unit of state or local government, the definition differs. It then includes "any person who owned, operated or otherwise controlled activities at such facility immediately [before the transfer to the governmental authority]." 42 U.S.C. § 9601(20)(A)(iii). It thus appears that the drafters of the statute distinguished an operator from a person who "otherwise controlled" a facility. When the owner of a facility contracts out the daily running of the operation to a third party, that party presumably attains operator status (and its attendant liability). However, when a parent corporation

actively participates in the affairs of its subsidiary consistent with the restrictions imposed by traditional corporate law, nothing in the definition just cited or in the rest of the statute indicates that the parent has assumed the role of operator.

Despite the definition of "owner or operator," several circuits and the district court below have determined that parent corporations can attain operator status by exerting significant control over the operations of their subsidiaries. *See, e.g., Kayser-Roth*, 910 F.2d at 26-27; *Lansford-Coaldale Joint Water Auth.*, 4 F.3d at 1221; *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 842 (4th Cir), *cert. denied*, — U.S. —, 113 S.Ct. 377, 121 L.Ed.2d 288 (1992); *CPC Int'l v. Aerojet-General*, 777 F.Supp. at 572-73.

While we understand the district court's desire to extend the reach of CERCLA so that its remedial purpose is given maximum impact, the "new, middle ground" threatens to sweep away the protections long afforded by the corporate form with respect to limited liability. In our view, nothing in the statute or its legislative history supports such a reading. As the Fifth Circuit has noted in this context, "[i]f Congress wanted to extend liability to parent corporations it could have done so, and it remains free to do so." *Joslyn Mfg. Co. v. T.L. James & Co., Inc.*, 893 F.2d 80, 83 (5th Cir.1990).

The district court's approach presents a number of problems. First, it replaces the relatively bright line provided by the doctrine of piercing the corporate veil, which typically requires a fraudulent purpose, with a nebulous "control" test. When, precisely, is a parent acting in a manner consistent with its investment

relationship as opposed to a manner that triggers operator liability? The indicia enumerated by the district court, such as participation in the subsidiary's board of directors and involvement in specific policy decisions, offer little guidance. Certainly, these activities are not grounds traditionally relied upon to pierce the corporate veil.

Second, the threat of unlimited liability will likely deter private sector participation in the cleanup of existing sites. The case before us illustrates this point. There is no dispute that the MDNR actively sought a private sector partner to take over and assist in the remediation of the site. Aerojet indicated an interest on the condition that it could cap its potential liability for environmental cleanup, which it sought to accomplish through the negotiation of the agreement with the MDNR and the use of subsidiaries. To scuttle such sensible and legitimate precautions in favor of an unpredictable "control" test would actually contravene the public interest by discouraging businesses from becoming involved in such projects.[3]

In view of its flaws, we reject the district court's "new, middle ground" for defining liability. We conclude that a parent corporation incurs operator liability pursuant to section 107(a)(2) of CERCLA, for the conduct of its subsidiary corporation, only when the requirements necessary to pierce the corporate veil are met.

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[3] Although it does not affect our resolution of the liability issue, we note in passing that these negotiations occurred before the enactment of CERCLA.

In determining whether the circumstances in this case warrant a piercing of the corporate veil in order to disregard the separateness of the corporate entities, we look to state law. *See Anspec*, 922 F.2d at 1248. Michigan appears to follow the general rule that at least two definitive requirements must be met in order to pierce the corporate veil. First, there must be such a unity of interest and ownership that the separate personalities of the corporation and its owner cease to exist; second, the circumstances must be such that adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice. 1 William M. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 41.30 (perm. ed. rev. vol. 1990); Stephen H. Schulman et al., Michigan Corporation Law & Practice § 3.9(c) (1991 Supp.); *see also Bodenhamer Bldg. Corp. v. Architectural Research Corp.*, 873 F.2d 109, 111-12 (6th Cir.1989) (citing cases). Organization of a corporation for the avowed purpose of avoiding personal responsibility does not in itself constitute fraud or reprehensible conduct justifying a disregard of the corporate form. *Gledhill v. Fisher & Co.*, 272 Mich. 353, 359, 262 N.W. 371, 373 (1935).

The district court relied upon the following factors in determining that CPC was an "active operator" of its subsidiary and therefore directly liable under section 107(a)(2): 100% ownership of Ott II; participation on Ott II's board of directors; a cross-pollination of officers who were involved in decision-making and daily operations; active participation by CPC officials in environmental matters; and financial control of Ott II through approval of budgets and capital expenditures. *CPC Int'l v. Aerojet-General*,

777 F.Supp. at 575. While these factors reveal a parent that took an active interest in the affairs of its subsidiary, none of them indicate that CPC utilized the corporate form to perpetrate a "fraud or wrong" as required before a court can pierce the veil.

Accordingly, the district court's finding of liability with respect to CPC must be reversed.

B. *MDNR Liability*

The district court rejected liability claims that were advanced against the MDNR on two fronts: as an operator and as an "arranger." Only the district court's decision regarding arranger liability is appealed.

Section 107(a)(3) of CERCLA imposes liability on:

> any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility . . . owned or operated by another party or entity and containing such hazardous substances.

42 U.S.C. § 9607(a)(3).

It is contended that the MDNR incurred arranger liability when it negotiated with Cordova/California for the acquisition of the site and agreed with Cordova/California on a plan to clean up the groundwater contamination.

We agree with the district court's conclusion that the MDNR escapes liability because its actions were

taken in response to an environmental emergency as provided in section 107(d)(2):

> No state or local government shall be liable under this subchapter for costs or damages as a result of actions taken in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person. This paragraph shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or local government. For the purpose of the preceding sentence, reckless, willful, or wanton misconduct shall constitute gross negligence.

42 U.S.C. § 9607(d)(2). Our reading of the record indicates that the MDNR acted in good faith when attempting to address the groundwater contamination of the site. That its efforts proved to be less than entirely successful is unfortunate, but does not subject the agency to liability.

C. *Liability of Aerojet and its Subsidiaries*

1. *Owner Liability*

The district court held both Aerojet and Cordova/Michigan liable as present owners of the site under section 107(a)(1) which assigns liability to "the owner and operator of a vessel or a facility." 42 U.S.C. § 9607(a)(1). Cordova/Michigan does not challenge this decision on appeal and we therefore express no opinion with respect to its liability.

As to the parent corporation, the district court appropriately looked to Michigan law in determining

whether to pierce the corporate veil. The court, however, misapplied that law. The court determined that Aerojet had "totally dominated Cordova/Michigan, creating a complete identity of interests between the parent and its wholly owned subsidiary." *CPC Int'l v. Aerojet-General*, 777 F. Supp. at 578. Accordingly, the court determined that it was appropriate to pierce the corporate veil and impose vicarious liability. Among the grounds cited for its decision, the court highlighted the total ownership by the parent, Aerojet's active participation in the acquisition of the site, the timing of the incorporation of the subsidiaries, cross-pollination of corporate officers, financial control, and the integration of the businesses. *Id.* at 577.

These actions, however, do not approach the level of culpable conduct necessary to pierce the corporate veil under Michigan law. *Bodenhamer Bldg. Corp.*, 873 F.2d at 112. While Aerojet obviously sought to limit its liability for existing environmental problems through good faith negotiation with the MDNR and prudent use of the corporate form, there is nothing to suggest that the company acted with fraudulent intent or otherwise sought to distort the legitimate purposes of the corporate forms. Although Aerojet took an active interest in its subsidiaries, we are not persuaded that Cordova/Michigan was anything but a viable corporate entity. Accordingly, the district court erred when it pierced the corporate veil to assign liability to Aerojet as an owner.

The district court also noted that Cordova/California actually owned the site from October 1977 until November 1978. Although the company began clean-up operations as required by its agreement with the MDNR, the district court found that additional releases of hazardous substances occurred during this period. *CPC Int'l v. Aerojet-General*, 777 F. Supp. at 579. It thus imposed liability on Cordova/California as a former owner pursuant to section 107(a)(2).

This conclusion, however, conflicts with the district court's summary of activity at the site during the ownership of the Cordova companies. *Id.* at 556. On remand, therefore, we ask the district court to indicate with greater specificity precisely which portions of the record it relies upon to support a finding that additional releases of hazardous substances occurred during Cordova/California's brief ownership. Absent such evidence, liability will not attach to Cordova/California as a former owner of the site.

2. *Operator Liability*

Finally, we turn to the district court's alternative imposition of liability on Aerojet pursuant to section 107(a)(2), precisely the same basis for liability that we have already discussed, and rejected, with respect to CPC. Since we reject the "control" test, no liability attaches unless the corporate veil can be pierced. We therefore conclude that Aerojet cannot be held liable as an operator pursuant to section 107(a)(2).

3. *Defenses*

Upon remand, the district court should also revisit its treatment of the defense raised by Aerojet, Cordova/California, and Cordova/Michigan under section 107(b)(3). The pertinent part of the statute follows:

> [A] person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were *caused* solely by—
>
> ....
>
> (3) an act or omission of a third party other than . . . one whose act or omission occurs *in connection with* a contractual relationship, existing directly or indirectly, with the defendant . . . if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, . . . and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions. . . .

42 U.S.C. § 9607(b) (emphasis added).

In parsing the exceptions to the defense, the district court noted that under 42 U.S.C. § 9601(35)(A), the term "contractual relationship" includes deeds transferring title. Thus, the district court concluded that a defense would be unavailable to a defendant who had a direct or indirect contractual

relationship with the parties responsible for contaminating the site. *CPC Int'l v. Aerojet-General*, 777 F. Supp. at 581. Under this view, the defense could not be invoked by any defendant who was a party to a deed with a polluter. The district court, however, ignored the requirement that, in order to render the defense inapplicable, the hazardous substance release must have resulted from the act of a third party "in connection with" the contractual relationship with the defendant. The "in connection with" language of the defense appears to have been designed to preclude a person from escaping liability by contracting for a third party to do his dirty work for him.

As we pointed out above, from what we glean from the district court's recitation of facts, the release of hazardous substances appears to have been *caused* solely by the predecessors of these three defendants.

IV. CONCLUSION

For the foregoing reasons, the district court is **reversed** in part and **affirmed** in part and this cause is **remanded** to the district court for further proceedings consistent with this opinion.

RYAN, Circuit Judge, dissenting.

The court's opinion today rests primarily on three grounds:

- That a parent corporation cannot, as a matter of law, be held directly liable under 42 U.S.C. § 9607(a)(2) as an "operator" of a facility owned and ostensibly operated by its subsidiary corporation, but may face *only* vicarious liability under state law corporation veil piercing principles;
- That piercing the corporate veil under Michigan law requires circumstances showing that the corporate form was used for a "fraudulent purpose."
- That the district court erred in finding that the defendants failed to prove their entitlement to the so-called third-party defense under 42 U.S.C. § 9607(b)(3).

In my judgment, the court is mistaken on all three grounds, and I therefore respectfully dissent.

I.

Direct Liability of a Parent Corporation under § 9607(a)(2)

Nothing in CERCLA, 42 U.S.C. § 9601 *et seq.*, excludes a parent corporation, as a matter of law, from liability for operating a contaminating facility if, in fact, it is operating it. CERCLA identifies the individuals and entities that may be held directly liable as responsible parties, and they include, as relevant here:

> (1) the owner and operator of a . . . facility, [and]
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of.

42 U.S.C. § 9607(a)(1), (2).

CERCLA defines "owner or operator" as "*any person* owning or operating such facility," § 9601(20)(A) (emphasis added), and excludes from the definition "a person, who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility," *id.* The next subsection defines "person" to include a corporation. § 9601(21).

The district court came to the conclusion, as I do, that a parent corporation may face potential liability as an operator of a contaminating facility because the plain language of § 9607(a)(2) indicates that Congress intended to impose liability on *any* entity actually operating a facility, regardless of the nature of the entity's ostensible interest in the facility. Nothing in the language of § 9607 or elsewhere in CERCLA suggests that Congress's definitions of "operator" or "person" include any corporation except a parent corporation.

The majority opinion holds, however, that Congress indeed intended to exclude parent corporations from potential direct liability as facility operators because Congress did not "contemplat[e] the abandonment of traditional concepts of limited liability associated with the corporate form." Maj. op. at 589. But that conclusion seems to me to beg the question. The question under subsection (a)(2) is not whether a parent corporation may be held vicariously liable for abuse of its subsidiary's corporate form—clearly it may—but whether Congress has created direct liability if the facts show that the parent corporation was the actor actually operating a contaminating facility. Stated differently, the issue is whether Congress has excused a parent corporation who is in fact

operating a contaminating facility from direct liability, if it is doing so in the name of a corporate subsidiary. The district court thinks not, and I agree.

The district court held that a parent corporation may be held directly liable under § 9607(a)(2) as an operator if its level of control over the subsidiary is so complete and pervasive as to exceed mere oversight:

> In this court's view, then, a parent corporation is directly liable under section 107(a)(2) as an operator only when it has exerted power or influence over its subsidiary by actively participating in and exercising control over the subsidiary's business during a period of disposal of hazardous waste. A parent's actual participation in and control over a subsidiary's functions and decision-making creates "operator" liability under CERCLA; a parent's mere oversight of a subsidiary's business in a manner appropriate and consistent with the investment relationship between a parent and its wholly owned subsidiary does not.

CPC Int'l, Inc. v. Aerojet-General Corp., 777 F. Supp. 549, 573 (W.D.Mich.1991).

The question is simply one of fact. The parent corporation is liable if it is shown to have been the operator-in-fact of the facility as indicated by the extent of its domination and control of its subsidiary—the ostensible operator. In such circumstances, there is no issue of veil piercing at all;it is a matter of applying the language of § 9607(a)(2). As the district court pointed out, some of the factors relevant to deciding whether the parent is the

operator-in-fact include considerations such as the parent corporation's involvement in the subsidiary's board of directors and daily operations, and the parent corporation's control over the subsidiary's policy making in areas such as personnel, finance, and waste disposal. Also relevant are the facts leading up to the subsidiary's origin and the reasons for its existence, and the parent's level of financial monitoring and its cooperation or consolidation with the subsidiary's accounting, legal, and research functions.

At least three other circuits have held that a parent corporation may be held directly liable as an operator under § 9607(a)(2) without any consideration of corporate veil piercing. In *United States v. Kayser-Roth Corp.*, 910 F.2d 24 (1st Cir.1990), *cert. denied*, 498 U.S. 1084, 111 S. Ct. 957, 112 L.Ed.2d 1045 (1991), the court declared that the plain language of CERCLA compelled the conclusion that parent corporations may be held directly liable under § 9607(a)(2):

> Congress, by including a liability category in addition to owner ("operators") connected by the conjunction "or," implied that a person who is an operator of a facility is not protected from liability by the legal structure of ownership. Given this grammatical construction and the broad definition of "person," corporate status, while relevant to determine ownership, cannot shield a person from operator liability. In addition, the legislative history provides no indication that Congress intended "all persons" who are "operators" to exclude parent corporations . . . . Thus, our analysis of the statute and its legislative purpose and history reveals no reason why a parent corporation cannot be held liable as an operator under CERCLA.

Id. at 26 (citation omitted).

And, "[t]o be an operator requires more than merely complete ownership and the concomitant general authority or ability to control that comes with ownership. At a minimum it requires active involvement in the activities of the subsidiary." *Id.* at 27.

In *Lansford-Coaldale Joint Water Authority v. Tonolli Corp.*, 4 F.3d 1209 (3d Cir.1993), the court embraced the *Kayser-Roth* standard, emphasizing that "operator liability may be established even without evidence that a [parent] corporation controlled the environmental decisions of an affiliated corporation as long as there exist other factors which sufficiently demonstrate pervasive control." *Id.* at 1222 n. 13.

Similarly, in *Jacksonville Electric Authority v. Bernuth Corp.*, 996 F.2d 1107 (11th Cir. 1993), the court agreed that the test for parent corporation liability as an operator was whether the parent "'exercises actual and pervasive control of the subsidiary to the extent of actually involving itself in the daily operations of the subsidiary. Actual involvement in decisions regarding the disposal of hazardous substances is a sufficient, but not a necessary, condition to the imposition of operator liability.'" *Id.* at 1110 (quoting *Jacksonville Elec. Auth. v. Eppinger and Russell Co.*, 776 F. Supp. 1542, 1547-48 (M.D.Fla.1991)).

Two other circuits apparently would hold a parent corporation directly liable as an operator not because the parent corporation actually controlled the sub-

sidiary, but rather because it had the authority to do so. In *Nurad, Inc. v. William E. Hooper & Sons*, 966 F.2d 837 (4th Cir.), *cert. denied*, 506 U.S. 940, 113 S. Ct. 377, 121 L. Ed.2d 288 (1992), the Fourth Circuit held that the key inquiry is not whether the parent corporation actually controlled the subsidiary, but rather whether it had the "'*authority* to control the operations or decisions involving the disposal of hazardous substances at the [s]ite.'" *Id.* at 842 (emphasis in original). In *dicta*, the Ninth Circuit also has identified "authority to control the cause of the contamination" as the standard. *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1341 (9th Cir.1992).

In addition, the Tenth Circuit, in *FMC Corp. v. Aero Industries, Inc.*, 998 F.2d 842 (10th Cir.1993), applied the *Kayser-Roth* standard to impose operator liability on a company director directly, and not under state corporation law veil piercing standards.

Although I would not go so far as to hold, as the Fourth and the Ninth Circuits would, that mere "authority to control" is sufficient, it is clear that all the circuits that have addressed the point, save one, have found that a parent corporation is exposed to direct liability under § 9607(a)(2) without regard to common law veil piercing.

Only the Fifth Circuit has adopted a narrower view of operator liability for parent corporations: "CERCLA does not define 'owners' or 'operators' as including the parent company of offending wholly-owned subsidiaries. Nor does the legislative history indicate that Congress intended to alter so substantially a basic tenet of corporation law." *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80, 82 (5th Cir.

1990), *cert. denied*, 498 U.S. 1108, 111 S. Ct. 1017, 112 L.Ed.2d 1098 (1991). However, another panel of the same court recently observed, in *dicta*, that an individual shareholder or officer could be held directly liable as an operator:

> Under traditional concepts of corporate law, the principle of limited liability would protect officers or employees like [the shareholder here] from being held responsible for the acts of a valid corporation. However, CERCLA prevents individuals from hiding behind the corporate shield when, as "operators," they themselves actually participate in the wrongful conduct prohibited by the Act . . . . In such cases, a defendant can be held individually liable for his wrongful conduct. "[T]his personal liability is distinct from the derivative liability that results from 'piercing the corporate veil'" where we would hold the owners of a less than bona fide corporation responsible for corporate acts.

Riverside Mkt. Dev. Corp. v. International Bldg. Prods., Inc., 931 F.2d 327, 330 (5th Cir.), *cert. denied*, 502 U.S. 1004, 112 S. Ct. 636, 116 L. Ed.2d 654 (1991).

I conclude, as the district court did, and as the First, Third, Tenth, and Eleventh Circuits have, that a parent corporation may be held directly liable as an operator of a contaminating facility under § 9607(a)(2) if the facts of the case show that its domination and control of the subsidiary corporation ostensibly operating the facility is so pervasive that the parent is the operator in fact.

II.

CPC's Liability under § 9607(a)(2)

The district court found that CPC, Ott II's parent corporation, so totally and completely controlled Ott II that CPC was the actual operator of the contaminating facility in Dalton Township, Michigan, and is therefore directly liable under § 9607(a)(2) as the operator of the site. I agree.

The facts, as found by the district court, are these:

From CPC's acquisition of Ott II in October 1965 through April 1966, all four directors on Ott II's board were CPC officers. Over the next three and one-half years, at least three of the eight board members were officers of CPC, and for the following two and one-half years, until CPC sold Ott II, CPC officials comprised the majority of the eleven-director board. At all times during Ott II's existence, the chairman of its board was a high-level CPC executive, appointed by CPC's president.

In addition, the managers of Ott II who exerted active control over the subsidiary's day-to-day activities also were officers of CPC. Arnold Ott, who had been chief executive officer of Ott I, continued as Ott II's chief executive officer until 1969, during which time he also was CPC's vice president for scientific research and president of CPC's development company, a subsidiary with oversight responsibility for several CPC subsidiaries including Ott II. In addition, James Eiszner, who had been Ott I's vice president of marketing. served as Ott II's president from 1967 to 1970. During Eiszner's tenure with Ott

II, he also served as vice president of CPC's development company, and eventually became CPC's chief executive officer. Moreover, Eiszner, in particular, was criticized during his tenure as an Ott II official for paying too much attention to his CPC responsibilities and not enough attention to Ott II. Beverly Warner served as Ott II's chief executive officer from 1970 until it was sold in 1972, at the same time serving as president of CPC's development company.

In addition to CPC's participation through Ott II's board in Ott II's environmental matters, CPC's environmental affairs director, G.R.D. Williams, was influential in setting Ott II's environmental policies. For example, because Williams did not believe Ott II needed a biological waste treatment facility, Ott II officers abandoned presenting plans for such a facility at a meeting with the state of Michigan. In addition, Williams repeatedly controlled the interface between Ott II officials and state and federal regulators, and instructed Ott II's officers "to consult with CPC before responding to regulatory questionnaires or other inquiries." 777 F. Supp. at 561.

Finally, as the district court found, CPC's involvement in Ott II's financial affairs involved more than mere review and oversight. For example, CPC made loans to Ott II in excess of $5 million, while assuming many of Ott II's existing loans. In addition, CPC commingled its funds with Ott II's funds. CPC also limited the amount of capital expenditures that Ott II could approve without further approval by CPC's board of directors. As to personnel matters, CPC repeatedly participated in Ott II's labor negotiations with local unions.

Based on these and many other findings, the district court concluded that, "[t]he evidence shows a level of participation and control by CPC that exceeds the bounds of an interested investor and enters the realm of an active operator." *Id.* at 575. These findings are amply supported in the record. Accordingly, the district court's conclusion that CPC was directly liable under § 9607(a)(2) as an operator should be affirmed.

III.

Aerojet's Liability under § 9607(a)(1)

The district court found Aerojet liable as a present "owner" of a contaminated facility under § 9607(a)(1). It did so after finding that the facts justified piercing the corporate veil that thinly shielded Cordova/Michigan from Aerojet.

The majority opinion holds that the district court erred because it misapplied Michigan law: "[The district court's findings do] not suggest that Aerojet operated with a fraudulent purpose; such a fraudulent purpose is, as we read Michigan corporate law, a prerequisite to disregard of the corporate form." Maj. op. at 592 (citing *Bodenhamer Bldg. Corp. v. Architectural Research Corp.*, 873 F.2d 109, 113 (6th Cir. 1989)).

While there is no question that fraud justifies piercing the corporate veil, there is ample authority under Michigan law for finding parent corporation liability through veil piercing for less egregious unjustified use of the corporate form.

The Michigan Supreme Court repeatedly has held that veil piercing is not limited to instances of fraud or illegality. In *Potter v. Michigan Bell Telephone Co.*, 246 Mich. 198, 224 N.W. 438 (1929), the court disregarded the corporate form despite recognizing that "[f]raud [wa]s expressly disclaimed." *Id.*, 224 N.W. at 439. In *Herman v. Mobile Homes Corp.*, 317 Mich. 233, 26 N.W.2d 757 (1947), the court held that when a parent corporation's control of its limited purpose subsidiary is so complete as to result in the subsidiary being a "mere instrumentalit[y]," piercing is appropriate to avoid an injustice, even in the absence of fraud. *Id.*, 26 N.W.2d at 762-63.

More recently, the Michigan court affirmed that equity alone may require setting aside the corporate form. In *Wells v. Firestone Tire and Rubber Co.*, 421 Mich. 641, 364 N.W.2d 670 (1984), a plaintiff attempted to avoid the workers compensation exclusivity provision in Michigan law by bringing a tort action against the employer's parent corporation. The court rejected the attempt, invoking the piercing doctrine to find that the parent and employing subsidiary were a single corporate entity. As the court noted, the injustice to be avoided was abrogation of an overriding public policy interest.

> Our disregard of the separate corporate entities of Firestone and its wholly owned subsidiary is premised upon our recognition of the important public policies underlying the Michigan Worker's Disability Compensation Act and our belief that a contrary determination would be inequitable under the facts of this case. . . .

> If the statute is to be construed liberally when an employee seeks benefits, it should not be construed differently when the employer asserts it as a defense to a tort action brought by the employee who claimed and accepted benefits arising from that employment relationship. . . . Indeed, under the facts and circumstances of this case, we would not have permitted Firestone to shield itself behind its wholly owned subsidiary in order to avoid payment of workers' compensation benefits to plaintiff.

Id., 364 N.W.2d at 675. The *Wells* court did not require proof of a "fraudulent purpose."

Indeed, this court has observed, in *dicta* to be sure, that Michigan law permits veil piercing upon a showing of *any* of the following:

> (a) a corporation and shareholders have complete identity of interests; (b) the corporation is a mere instrumentality of the shareholders; (c) the corporation is a devise to avoid a legal obligation; or (d) the corporation is used to defeat public convenience, justify a wrong, protect fraud or defend a crime.

Bodenhamer Bldg. Corp., 873 F.2d at 112 (emphasis added).

Thus, while there is authority in Michigan for denying veil piercing where fraud is absent, *see Klager v. Robert Meyer Co.*, 415 Mich. 402, 329 N.W.2d 721 (1982), the weight of authority allows piercing when the shielding corporation is a mere instrumentality and justice requires that it be disregarded.

Here, the district court found that Aerojet was the 100 percent shareholder of Cordova/California who, in turn, was the sole shareholder of Cordova/Michigan. In addition, as the district court found, the boards of directors of Cordova/California and Cordova/Michigan were titular only, not even convening for meetings. At least twenty Aerojet officers simultaneously held the same or nearly identical positions in Cordova/California and Cordova/Michigan. Aerojet so completely controlled the finances of all companies, that neither Cordova/California nor Cordova/Michigan were permitted to maintain separate bank accounts. In addition, there was evidence that Aerojet used Cordova/Michigan by transferring to Cordova/California millions in worthless debt owed to Aerojet by Cordova/Michigan, effectively canceling debt owed by Aerojet to Cordova/California. These findings are supported by the record and are not clearly erroneous. The evidence established that Cordova/Michigan operated as a mere instrumentality of Aerojet.

Even more compelling are the findings of the district court regarding Cordova/Michigan's corporate purpose. When Aerojet began negotiations with MDNR for the Dalton Township property, Aerojet negotiated side-by-side with its then unincorporated division, Cordova. After Aerojet entered two short-term stipulations with MDNR, and merely eleven days before the sale was concluded, Aerojet incorporated Cordova as a wholly-owned subsidiary. Although Aerojet had initially drafted the stipulation and consent order with MDNR, it was "Cordova Chemical Company" that actually signed the agreement. Then, in November 1978, with the remodeling

of the facility complete and manufacturing about to begin, Cordova/California incorporated Cordova/Michigan, transferring to it Cordova/California's ownership of the facility. Despite the supposed separate corporate form of Cordova/Michigan, throughout operations, Aerojet actively participated in negotiations with prospective buyers for the possible sale of the facility. Once Cordova/Michigan ceased operations at the site, it was Aerojet that took responsibility for leasing portions of the site to third parties. Accordingly, it is clear that Aerojet took pains to insulate itself from environmental liability for the situation they knew existed at the site. Aerojet admits as much in their brief:

> By using well-capitalized, non-fraudulent, separate corporate subsidiaries, such as Cordova/California and then Cordova/Michigan, Aerojet could justify an attempt to reclaim and make the waste Site productive without risking all of its corporate assets. A rule of law imposing enormous environmental liability on parent corporations whose subsidiary neither perpetrated a fraud nor contributed to actual contamination would result in contaminated waste sites being permanently abandoned as unproductive, orphan properties, because no rational corporate officer could support a decision to rehabilitate a contaminated site if such liability were unavoidable.

Thus, Aerojet admits that Cordova/Michigan was established solely as a facade, to avoid any legal obligation to pay for further environmental cleanup at the site. Under Michigan law, their admission is sufficient to justify piercing the corporate veil. *See Potter*, 224 N.W. at 440.

As Aerojet points out, it is possible that a refusal to allow a prospective purchaser of a contaminated site to avoid liability will result in a scarcity of willing buyers. Certainly, both EPA and MDNR have a substantial interest in locating conscientious purchasers, who are willing to reclaim environmentally corrupt facilities. However, there is no evidence that the Michigan courts would view this interest as an exception to the state's veil piercing standard, especially in light of the competing interest in imposing environmental cleanup costs on private industry rather than on taxpayers. Congress certainly was not deterred by this argument, given its balancing of interests in favor of imposing liability on new owners. Moreover, Aerojet and the Cordovas are not blameless, as they would have the court believe. The district court found that the entities actively contributed to the contamination and then failed to take remedial action, despite knowledge that contamination was continuing to migrate.

Accordingly, the district court's conclusion that, by piercing the corporate veil, Aerojet may be held liable as an "owner" under 42 U.S.C. § 9607(a)(1) should be affirmed.

I further agree with the district court that Aerojet was directly liable as an operator under § 9607(a)(2):

> In light of the same facts that were probative in concluding Aerojet is liable under section 107(a)(1), the court concludes that Aerojet operated the site through active participation and pervasive control over the businesses of both Cordova/California and Cordova/Michigan.

> As with CPC's involvement with Ott II, Aerojet's participation and control over the board, management and decision-making at Cordova/California and Cordova/Michigan shows that the parent operated the facility. Aerojet's conduct toward its subsidiaries extended well beyond the activities that are merely indicative of a parent's general oversight of a wholly owned subsidiary.
>
> Accordingly, the court concludes the [sic] Aerojet is directly liable as an operator under section 107(a)(2).

CPC Int'l, Inc., 777 F.Supp. at 580.

IV.

Third Party Defense under § 9607(b)(3)

I do not agree that the district court should be required, upon remand, to "revisit its treatment of the [third-party] defense raised by Aerojet, Cordova/California and Cordova/Michigan" under § 9607(b)(3).

To succeed under § 9607(b)(3), the defendants are required to prove all four elements of a third party defense which are:

1. That they did not contribute to the contamination.
2. That they were not in a direct or indirect contractual relationship with any person who, in connection with the contractual relationship, caused the contamination.
3. That they exercised due care throughout their ownership or operation of the contaminating facility.

4. That they protected against those acts and omissions of the polluting persons, and the consequences of those acts and omissions, that were foreseeable.

See 42 U.S.C. §§ 9607(b)(3); *see also Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 325 (7th Cir. 1994). The district court found that the defendants failed to carry their burden on all four elements of the § (b)(3) defense.

The majority opinion, in ordering that the district court "revisit its treatment of the defense" raised by the defendants, addresses only the "contractual relationship" ground. Even if the district court erred in its treatment of that element of the defense, its findings that the defendants have not carried their burden of proving the remaining three elements of the § 9607(b)(3) defense, which the majority opinion does not question, is amply supported in the record.

The district court committed no clear error in finding that the defendants demonstrated neither the exercise of due care nor the use of appropriate precautions. For example, in a May 1980 environmental risk report covering Aerojet and several subsidiaries including Cordova/Michigan, the defendants repeatedly stated their intent to take an ostrich approach with respect to the contamination problem:

> The most significant environmental problems associated with the facility are those relating to the residues of past industrial occupants of the site. Management has adopted the position that any injury to others arising out of contamination from these residues is the responsibility of the

> State of Michigan Department of Natural Resources and that, accordingly, Cordova should insulate itself from any knowledge of, or involvement in monitoring these wastes.

The report went on to acknowledge that waste drums remained buried, despite completion of MDNR's removal efforts. Moreover, the report acknowledged that the stipulation and consent order entered by Cordova and MDNR was never intended to resolve the contamination problem. In describing the responsibilities assumed by the parties under the stipulation and order, the report admitted that MDNR's duties were limited to removing 8700 drums and a portion of the contaminated soil and sludge, and that the consent order's hold harmless clause relieved the defendants only of liability arising out of these specified removal efforts. In addition, as the report acknowledged, the MDNR absolved the defendants of liability relating to procurement of an alternative community water source.

As the district court pointed out, and as the report confirms, the stipulation and order did not resolve responsibility for remaining drums and contaminated soil and sludge, as well as responsibility for groundwater contamination. In this regard, the report specifically opined:

> Between 65 and 100 monitoring wells for testing groundwater were either installed by Story or have been installed more recently under a State/Federal study of groundwater contamination at the site. The study is being carried out by several consulting organizations under contract to the state. Cordova management believes the studies show little or no contamination but has avoided

> any participation or liaison with the study teams . . . . Because of the possibility that Cordova's potential liability for groundwater contamination may have survived the Consent Order, it would appear desirable for Cordova management to keep abreast of current monitoring results. In addition, although a high chloride content would show continuation of problems from the old Story wastes, a high sulphate concentration would indicate seepage problems arising out of Cordova's current operations.

Accordingly, fully aware that waste drums remained buried beneath the site and that the majority of the contaminated soil had not been removed, and cognizant of groundwater contamination to which they may have been contributing, the defendants believed the solution to these problems was to wear blinders. Their head-in-the-sand approach can hardly be characterized as the exercise of due care.

For the same reasons, it cannot be said that the defendants took adequate precautions to protect against the consequences of Ott II's and Story's omissions and acts. While the parties, in their briefs, debate whether reimplementation of the purge wells would have been an adequate precaution, they overlook the big picture. The defendants, fully aware that contamination problems on their property were not being addressed, chose to take no precautions to protect against the foreseeable consequences of these problems—namely, further migration. Accordingly, because the defendants have failed to prove at least two of the requisite elements of the third-party defense, the district court properly held that they were not entitled to invoke it.

Since the defendants were required to prove all four elements of the defense, it is unnecessary to consider whether they sustained their burden regarding the remaining two elements, including whether any of the pollution was the act of a third party "in connection with" the contractual relationship with the defendants.

V.

I would affirm the judgment of the district court.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 92-2288/2326

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

CORDOVA CHEMICAL COMPANY OF MICHIGAN, ET AL.,
DEFENDANTS-APPELLANTS

CPC INTERNATIONAL INC., DEFENDANT-APPELLEE

ARNOLD C. OTT, ET AL., DEFENDANTS

MICHIGAN DEPT. OF NATURAL RESOURCES,
DEFENDANT-APPELLEE

[Filed: Oct. 19, 1995]

Before: MERRITT, Chief Judge; KENNEDY, MARTIN, MILBURN, NELSON, RYAN, BOGGS, NORRIS, SUHRHEINRICH, SILER, BATCHELDER, DAUGHTREY, and MOORE, Circuit Judges.

Prior report: 59 F.3d 584

ORDER

A majority of the Judges of this Court in regular active service have voted for rehearing of this case en banc. Sixth Circuit Rule 14 provides as follows:

> The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this court, to stay the mandate and to restore the case on the docket sheet as a pending appeal.

Accordingly it is **ORDERED** that the previous decision and judgment of this court is vacated, the mandate is stayed and this case is restored to the docket as a pending appeal.

The Clerk will direct the parties to file supplemental briefs and will schedule this case for oral argument as soon as possible.